REPORTS:

OR,

New Cases;

Taken in the 15, 16, 17, and 18 years of King CHARLES the FIRST.

With divers RESOLUTIONS and JUDGMENTS given upon solemn Arguments, and with great deliberation.

And the Reasons and Causes of the said Resolutions and Judgments.

COLLECTED

By JOHN MARCH of *Grays-Inn*, *BARRESTER.*

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REPORTS,

Easter-Term, 15° CAROLI,

In the Kings Bench.

IT was agreed by Justice *Jones* and Justice *Barckley* (the Lord Chief Justice and Justice *Crook* being absent) That if the Sheriff do arrest a man upon *mesne processe*, and return a *Cepi corpus*, and that the Defendant was rescued; that no Action lieth against the Sheriff: But if the party be taken upon an Execution, an Action upon the Case lieth against him; and so is the express Book of 16 E. 4. 2,3. *Br. Escape* 37. upon which Book Justice *Jones* said, That it was adjudged in this Court, as above is said.

2. It was agreed by the Court, That if a man in pleading derive an Estate from another man, and doth not shew what Estate he had from whom he deriveth his Estate, that is a good cause of Demurrer. And Justice *Jones* said, That if a man claim a Rent by Grant out of the Land of any other man, it is not sufficient for him to say, That such an one was seised and *concessit*; but he ought to express of what Estate he was seised: So is *Dyer*. But in this Case it was agreed, That the shewing of what Estate, *&c.* ought to be material to the maintenance and support of the Estate which he claimeth, otherwise it is not necessary.

3. An Action upon the Case for words, was brought by one who was Journey-man and Fore-man of a Shoomakers-shop,

 which

which was his living and livelihood, for these words, *viz. It is no matter who hath him, for he will Cut him out of doors.* And farther the Plaintiff did aver, that the common acceptance of these words amongst Shoomakers, is, *That he will begger his Master, and make him run away:* and shewed that he was particularly endamnified by speaking of those words. And the Court was clear of Opinion, that the Action would lie. And these Rules were taken and agreed. For some words an Action will lie without particular averment of any damage; as to call a man Thief, Traytor, or the like; these are *malum in se*: And some words will not bear Action without particular averment of some damage; as to say, *Such a one kept his wife basely, and starved her*; these words of themselves will bear no Action: but if the party of whom the words were spoken were in election to be married to any other, and by speaking of these words is hindred; there with such Averment they will bear an Action. It was farther agreed, That the words ought to be spoken to one that knows the meaning of them, otherwise they are not actionable, as in the principal Case, they were spoken to a Shoomaker; but if they had been spoken to any other who knew the meaning of them, it had been all one: And therefore scandalous words which are spoken to one in Welsh, or any other Language, which the party to whom they are spoken doth not understand, are not actionable. And it was agreed, That some words which are spoken, although of themselves they are not actionable, yet being equivalent with words which are actionable, they will bear an Action. And therefore it was said by Justice *Jones*, That in *York-shire* (as I remember) *Straining of a Mare*, is as much as *Buggering*: and because these do amount to as much, with averment they will bear Action. And all words which touch a man in his livelihood and profession will bear Action. And the Opinion of the Court also was, that the Averment ought to be, That in this (and shew it specially) the Plaintiff was damnified: and so it was agreed upon these Reasons, that the Action did lie.

4. The

4. The Opinion of the Court was upon a Judgment given there, there ought to be two *Scire facias*, one againſt the Principal, the other againſt the Bail; but one only is ſufficient in the Common Pleas, and that two *Nichils* returned do amount to *Scire feci*.

5. There was a Contract made at *Newcaſtle*, that a ſhip ſhould ſail from *Yarmouth* to *Amſterdam*; and there was an Action of Debt brought upon the Contract at *Newcaſtle*, and it was adjudged that the Action would not lie: and the difference was taken betwixt a particular and limited Juriſdiction, as in this caſe *Newcaſtle* is; and a general Juriſdiction, as one of the Courts at *Weſtminſter* hath: for in the firſt Caſe, no particular Juriſdiction ſhall hold plea of a thing which is done *in partibus tranſmarinis*, although the Original (as the Contract in the principal Caſe) be made in *England*; but contrary in caſe of general Juriſdiction, as any the Courts at *Weſtminſter* have.

6. The Cuſtome of *London* is, that any man in *London* may paſs over, or put over his Apprentices to any other man within the City.

King *and* Cokes *Caſe*.

7. *William Marſhal*, and other Bailiffs had an Execution (*viz.* a *Capias ad ſatisfaciend'*) againſt *Coke* and others; which Bailiffs came to *Coke*'s houſe, and lay one night in his out-houſes privily; and the next morning they came to his dwelling-houſe, and gave him notice of the Execution; but *Coke* ſhut the doors of his houſe cloſe, ſo as the Bailiffs could not enter; whereupon they brake the Glaſs-windows and the Hinge of the door, endeavouring to enter: whereupon *Coke* commanded them to be gone, or he would ſhoot them: notwithſtanding which, they did continue their ill doing; whereupon *Coke* ſhot *Marſhal* one of the Bailiffs: and whether this was

Manſlaughter or Murder, was the Queſtion. And *Rolls* argued, that it was not Murder for theſe cauſes. 1. Becauſe the act of the Bailiffs in breaking of the Glaſs and the Hinge of the door was an unlawful act, and was at their peril. Where the Kings Officer may break the houſe to ſerve any mean Proceſs or Execution, the differences are ſuch as are in *Semaynes* Caſe, *C.* 5. *part* 91, 92. 1. betwixt Real and Perſonal Actions: In Real Actions they may break the houſe to deliver ſeiſin to him who recovereth; contrary in Perſonal Actions. 2. There is a difference in the caſe of the King, and of a common perſon; where the King is party, in ſome caſes his Officers may juſtifie the breaking of a houſe, but not in the caſe of a common perſon. 13 *E.* 4. 9. 18 *E.* 4. 4. 4 *Rep.* 4. 9 *Rep.* 69. And therefore if they could not juſtifie the breaking of the houſe at the ſuit of a common perſon; then in the principal Caſe, they did a thing which was not warranted by Law: and therefore the killing of one of them was not Murder. But clearly, if the Bailiffs had lawfully executed their Office, then it had been Murder. 2. It was not Murder, becauſe the perſon was in his Houſe, which is his Caſtle and defence, which is a place priviledged by the Law. 26 *Aſſ.* 23. 3 *E.* 3. 330, 305. Beſides, the party is not bound to tarry till the Bailiffs come in and beat him. 2 *H.* 4. 8. 19 *H.* 6. 31. 34 *H.* 6. 16. 43 *Aſſ. pl.* 31. 3. This Authority which is given to the Kings Officer, is given by the Law: and if he execute it according to the Law, the Law will protect him; but if he exceed the priviledge given him by the Law, then all he doth is illegal, and he loſeth its protection. And he reſembled it to the *6 Carpenters caſe. C. 6. part.* Farther, one may pretend he hath ſuch a warrant, when he hath it not, of purpoſe to rob, or do ſome other miſchief. And it was agreed by all the Juſtices, *nullo contradicente*, that it was not Murder, but that it was Manſlaughter; for this reaſon eſpecially, becauſe the Officer was doing an unlawful act, not warranted by Law; and therefore it was at his peril if he were killed. And farther, upon this difference there ought to be malice in fact or in Law to make Murder; but in this Caſe there is none of them, for it is apparent that there was no malice

lice in fact: and there is no malice implied, for then it ought to be where a man kills another without any provocation, or the Minister of Justice in the due and lawful execution of his Office, which is not our Case; for here he did an unlawful act at the time he was killed; and therefore it was not Murder, but Manslaughter. There was a Case tried at the Sessions in the *Old-Baily*, which was thus: One *Lovell* had two Maid-servants, and one of them without his knowledge, had received into the house a Chare-woman, who (all being in their beds) by her negligence let a Thief into the house, and afterwards called out Thieves, Thieves; and afterwards *Lovell* came out of his Bed with a Sword in his hand, and the Chare-woman calling to mind that she was there without his privity or his wifes, hid her self behind the Dresser, and *Lovell*'s wife espying her there, cried out Thieves, Thieves; for which *Lovell* came and ran her into the brest with his Sword. And the Opinion of the Justices at the *Old-Baily*, and also of all the Justices of the Kings Bench, was, That it was neither Murder nor Manslaughter: Not Murder, because there was no forethought malice; not Manslaughter, because he supposed her to be a Thief; and if she had been a Thief, then it was clear that it was not Manslaughter.

8. It was resolved in the Chancery (as the Judges of the Kings Bench said) That where the Son is of full age, and is ravished, that the Father shall not recover Damages, because the Son being of full age might marry himself without the consent of the Father: and that was the reason given, as I conceive; and the Case was said to be Sir *Francis Lees* Case.

9. The Book of Canons is, that the Parson may Elect one Church-warden, and the Parishioners another.

10. There can be no Surrender without the Consent of the Reversioner.

11. It

11. It was Libelled in the Eccleſiaſtical Court for theſe words, *Thou art a Drunkard, or uſeſt to be drunk thrice a week.* And thereupon Prohibition was Prayed and Granted: and it was ſaid and agreed, That ſo it was adjudged betwixt *Vinior* and *Vinior*, in this Court. The Caſe in *Dyer*, 254. b. where the Preſentee was refuſed, becauſe he was a common haunter of Taverns, *&c.* was by Juſtice *Barckley* denied to be Law, and ſo agreed by Juſtice *Jones*, the Lord Chief Juſtice and Juſtice *Crooke* being abſent: But Juſtice *Barckley* was utterly againſt the Prohibition. 1. Becauſe the Action in the Eccleſiaſtical Court is only *pro ſalute animæ*. And 2. Becauſe that Drunkenneſs is in their Articles, and Preſentable. But Juſtice *Jones* granted a Prohibition, and ſaid that *Linwood* ſaid well, That if all things which are againſt the Law of God (or words to that effect) ſhould be tried in the Eccleſiaſtical Court, the Juriſdiction of the Temporal Court ſhould utterly be deſtroyed.

12. If there be an Indictment of Forcible Entry, if it appear that the Plaintiff had *ſeiſin* at the time of the Writ brought, there can be no Writ of Reſtitution; for the Statute ſaith, If he Enter with Force, or keep him out with Force: but yet in that caſe the King ſhall have his Fine. And there was an Indictment, which was a principal Caſe at Bar, which was, That the Defendant *adtunc & adhuc* doth keep the poſſeſſion forcibly, whereas the Plaintiff was in poſſeſſion. And thereupon a Writ of Reſtitution was awarded by reaſon of the word [*adhuc*] 3 *E.* 4. 19. it was adjudged, That where there is Forcible Entry, and Reteiner with Force, that both are puniſhable, although the Statute of 8 *H.* 6. 9. be in the disjunctive.

13. Deſcent of a Copy-hold ſhall not take away Entry. There ought to be a cuſtome to enable the Lord of a Mannor to grant a Copy-hold in Reverſion.

14. In

14. In the Council of Marches of *Wales*, they proceed according to Directions, and they cannot exceed them; and they have nothing to do with Freehold, for it is not within their Inſtructions. And they cannot hold Plea of Debt above fifty pouuds.

15. An Aſſignment of Rent to a Woman, out of Land of which ſhe is Dowable by Word, is good; but if ſhe be not Dowable of the Land, then the Aſſignment by Word is not good, and void; becauſe that in the firſt Caſe it is according to common Right, but in the laſt, not. 33 *H.* 6.

16. In a Writ of Error to Reverſe a Judgment in an Action of Debt upon an Arbitrament, the Error aſſigned was this: That two did refer themſelves to Arbitrament of their two ſeveral Arbitrators; and there is no word of Submiſſion: that the ſame is Error, and there was Error in the Entry of the Judgment; the entry of which was in this manner; *Conſideratum eſt*, and *per Curiam* is omitted and left out. And for theſe Errors, the Judgment was Reverſed.

Smith's *Caſe*.

17. ONe ſaid of him, *Thou art forſworn, and haſt taken a falſe Oath at* Hereford-*Aſſiſes, againſt ſuch a one*, naming the party. And the Opinion of the Court (the Chief Juſtice and Juſtice *Crooke* being abſent) was againſt the Action. But they conceived that the Action would have lied, if the Defendant had ſaid, *Thou art forſworn, and haſt taken a falſe Oath at the Aſſiſes, againſt ſuch an one*, with Averment that he was ſworn in the Cauſe.

18. It was ſaid at the Bar, That it was adjudged in this Court in *Appletons* Caſe, That where a man ſaid unto another by

by way of Interrogatory, *Where is my Piece thou ſtoleſt from me?* that it was actionable. Juſtice *Jones* remembred this caſe, where one ſaid, J. S. *told me, that* J. N. *ſtole a Horſe, but I do not believe him.* This with Averment that *J. S.* did not ſay any ſuch thing, would bear an Action. Juſtice *Barkley* ſaid, That an Action was brought upon theſe words, *You are no Thief?* and that theſe words with Averment, which imply an affirmative, will bear an Action.

19. It was ſaid to a Merchant, *That he was a couſening Knave.* And the Opinion of the Court was, (the chief Juſtice and Juſtice *Crooke* being abſent) that the words were not actionable, becauſe he doth not touch him in his Profeſſion, for the words are too general: But it was ſaid, That to call him Bankrupt was actionable. And in all Caſes where a man is touched in his Profeſſion, the words are actionable. But to call a Lawyer a Bankrupt, is not actionable. Juſtice *Jones* ſaid, that Serjeant *Heath* brought an Action for theſe words: One ſaid of him, *That he had Undone many*; and it was adjudged actionable; becauſe he touched him in his Profeſſion.

20. *Kingſton* upon *Hull* is a Particular and Limited Juriſdiction, and they held Plea of a Bond which was made out of their Juriſdiction; and thereupon a *Capias* was awarded againſt the Obligor, who was arreſted upon it, and ſuffered by the Sheriff to eſcape: And the Opinion of the Court was clear, That no eſcape would lie againſt the Sheriff, upon the difference in the caſe of the Marſhalſea, That if the Court hold Plea of a thing within their Juriſdiction, but proceed erroneouſly, that it is avoidable by Error; but if they have not Juriſdiction of the cauſe, all is void, and *coram non Judice*. 11 *H.* 4. and 19 *E.* 4. *Acc.* So in the principal Caſe: for they held Plea of a thing which was out of their Juriſdiction, and therefore the whole proceeding being void, no Action can lie againſt the Sheriff, for there was no Eſcape.

21. Where

21. Where a man is Outlawed, and the Outlawry reverſed, notwithſtanding the Original doth remain, and the cauſe that the Original was determined was the Outlawry; and now *Ceſſante cauſa ceſſat effectus.*

22. A man made a Leaſe for years, with exception of divers things, and that the Leſſee ſhall have *conveniens lignum non ſuccidendo, &c. vendendo arbores, &c.* Now the Leſſee cut down Trees, and the Leſſor brought an Action of Covenant: and the Opinion of the Court was, That the Action would lie, and that it is as a Covenant on the part of the Leſſee, becauſe the Law gives him reaſonable Eſtovers, and by this Covenant he abridgeth his Priviledge.

23. Juſtice *Jones* ſaid, and ſo it was agreed by the Court, In what caſe ſoever there is a Contract made to the Teſtator or the Inteſtate, or any thing which ariſeth by Contract, there an Action will lie for the Executor or Adminiſtrator; but Perſonal Actions die with the Teſtator or Inteſtate.

24. The Adminiſtrators of an Executor ſhall not ſue a *Scire facias* upon a Judgment given for the Teſtator, becauſe the Teſtator now died Inteſtate, becauſe there is no privity. And ſo it hath been many times adjudged. 1 *Rep.* 96. a. 5 *Rep.* 9. *b.*

The Earl of Oxford *and* Waterhouſe *Caſe*, in a Writ of Error to reverſe a Fine.

25. *Waterhouſe* levied a Fine, the Earl of *Oxford* pleaded that he was beyond Sea at the time of the Fine levied. *Waterhouſe* replied, That he came here into *England* in *Auguſt*, within the five years; and upon that they were at iſſue. The Jury found, that he came over in *July*. And notwithſtanding

ſtanding the Opinion of the Court was clear, That the Writ of Error did not lie: For although the Jury have found that he came over in *July*; yet the ſubſtance of the matter is, that he was in *England*, ſo as he might have made his Claim; and therefore the Fine ſhould bar him. And Juſtice *Barckley* compared it to the Caſe of 10 *Eliz. Dyer* 271. b. which Caſe is a *Quære* in *Dyer*, but Reſolved in the 6 *Rep.* 47. a. A man brought Debt againſt an Heir, who pleaded that he had nothing by Deſcent. The Plaintiff pleaded that he had Aſſets in *London*, and the Jury found Aſſets in *Cornwal*, and good; for the ſubſtance is, whether he had Aſſets or not.

26. If a Nobleman who is not a Baron or Earl of this Realm, in an Action brought againſt him, or by him, be named Knight, and Earl of ſuch a place, it is good, becauſe that although he cannot be ſued, or ſue another, by the name of Earl, Baron, &c. yet by the name of Knight he may, and that is ſufficient.

27. Writ of Error was brought here, to reverſe a Judgment given in *Ireland*, it is a *Superſedeas* to the Execution: for although the Record it ſelf is not ſent over, for fear of loſing the ſame in the water or otherwiſe, yet a tranſcript is made thereof, which is all one. And Juſtice *Barckley* compared it to the Caſe where a Writ of Error is brought in this Court to reverſe a Fine in the *Common Pleas*, there the Record it ſelf is not ſent, but a Tranſcript thereof, becauſe we have not a Cirographer to receive it, but the Tranſcript is all one.

Sir John Compton's *Caſe upon the Statute of* Wincheſter, 13 Ed. 1. *and* 27 Eliz. *Of Robberies.*

28. SIr *John Compton* Knight, brought an Action againſt the Hundred of *Oliſon* (or the like name) for a Robbery done upon *Red-hill* in the County of *Surry*, within the afore-

aforesaid Hundred, and the Robbery was done upon his man, and five hundred and ten pounds was taken from him. And in this Case it was agreed by the Justices, That although there be a remissness or negligence in the party who was robbed, to pursue the Robbers, or that he did refuse to lend his Horse to make Hue and Cry; yet this doth not take away his Action, nor excuse the Hundred, if notice be given with as much convenient speed as may be, as the Statute of 27 *Eliz.* speaks, for them to make Hue and Cry. And although the Party who was robbed, doth not know the Robbers at the present time, and thereof takes his Oath before a Justice of Peace, as the Statute of 27 *Eliz.* hath provided; and afterwards comes to know them, and so he affirm, yet this doth not take away his Action. And it was resolved also, that notice given in one Hundred five miles from the place where he was robbed, is sufficient; and the reason is, because that the party who is a stranger to the Country, cannot have conusance of the nearest place or Town. Chief Justice: That notice given at one Town, and Hue and Cry levied at another, is good. And the Jury found for the Plaintiff: And thereupon a *Quære* was made by one who was of Counsel with the Hundred, *Whether such persons who become Inhabitants after the Robbery, and before the Judgment, whether they should contribute?* And Justice *Barckly* said, That all who are Inhabitants at the time of the Execution, should pay it.

29. A Vicar cannot have Tithes but by Gift, Composition, or Prescription: For all Tithes *de jure* do appertain to the Parson.

30. A man was bound to the Good Behaviour, for Suborning of Witnesses.

Plowden *against* Plowden.

31. PLowden the Son brought Trespass against *Plowden* the Father, for taking the Plaintiffs Wife *cum bonis viri.*

viri. And the Case was, That he did reject and eject his Wife without giving of her Alimony: for which she had Sentence in the High Commission-Court; and the Defendant took those Goods for the Alimony of the Wife. And Justice *Barckley* said, That the Defendant might plead, Not guilty.

Lister *against* Hone, *in Trover and Conversion for a Hawk.*

32. JUdgment was given for the Plaintiff, but it was moved in arrest of Judgment, because it was not said in the Declaration, that it was a tame Hawk. *Dyer* 13 *Eliz.* 306. b. and 43 *E.* 3. *Acc.* And here it was said, That the words of the Declaration shew that it was a wild Hawk; for the words are, For taking *Accipitricem suum, Anglicè vocat'* a Ramish Fawlcon; and it was said that Ramish, is as much as to say, *inter ramos agens*; but that was denied: for a Ramish Hawk is a Fowl Hawk, by which the contrary is implied, that it was tame. And here it was farther said for the Defendant, that if [*reclamato*] be omitted, [*de bonis suis propriis*] will not help it. But it was said in affirmation of the Judgment, that although [*reclamato*] be omitted, yet, that [*de bonis suis propriis*] will help it: and Justice *Barckley* with all the Justices (except the Chief Justice, who was absent) did agree very strongly, That the Judgment should be stayed; because that a Hawk is *feræ naturæ*, and although it be tamed, yet if it fly away, and hath not *animam revertendi*, then *occupanti conceditur. Vide* 27 *Hen.* 8. And for the words, *de bonis suis propriis*, they do nothing, for the Party had but a Right of Possession, and not of Property: and if it be, it is but a qualified Property, as 7 *Rep.* 17. b. He agreed, that if a man hath a wild Hawk in his possession, and another man takes it out of his possession, Trespass will lie; but if it fly away, then *Capiat qui capere potest*: And thereupon Judgment was stayed.

Par-

Parkinſon *againſt* Colliford *and others*, Executors *of a Sheriff.*

33. THe Caſe was, That Judgment was given againſt another man at the Plaintiffs ſuit in Debt, in the Common Pleas, and upon that a Writ of Error was brought in the Kings Bench, and the Judgment affirmed; and upon that a *Fieri facias* directed to the Sheriff, who levied the Mony, and died, the Writ being not returned, and thereupon Debt was brought againſt his Executors: and theſe exceptions were taken. 1. That the Writ of *Fieri facias* was not returned, and therefore the Sheriff ſhould not be charged in Debt; but otherwiſe if it had been returned. 2. That no Debt lieth againſt the Sheriff, although it had been returned. 3. Admit that it would lie againſt himſelf, yet it will not lie againſt his Executors, becauſe it is a Perſonal wrong, and dieth *cum Perſona*. 4. That the *Fieri facias* was awarded out of this Court, and it doth not appear whether it were awarded after the Record removed into this Court or not. Juſtice *Barckley*, with whom all the other Judges did agree, was of Opinion, That Debt would lie againſt the Sheriff where he ſells goods upon a *Fieri facias*, for now he is Debtor in Law, and the Defendant diſcharged againſt the Plaintiff, and he may plead it; and therefore it is reaſonable that the Defendant ſhould be anſwerable to the Plaintiff; and he took the difference betwixt *Seiſin* of goods only, and where the Sheriff ſeiſeth and ſelleth them: for till Sale no Debt will lie againſt him. And it was ſaid, that Accompt will lie againſt him; and if Accompt, by the ſame reaſon, Debt. As to the return of the Writ, he ſaid that the Sheriff is not compellable to make it, and therefore it's nothing to the purpoſe; and the difference ſtands, where the Sheriff returns a Jury, where not: in caſe of *Elegit* the Writ ought to be returned, but not in caſe of *Fieri facias*, as is 1 *H.* 7. Clerk of the Hampers Caſe. Farther, I conceive that it will lie againſt the Executor, and it is not like the Caſes which are Perſonal, where the action *moritur cum Perſona*:

but

but here the goods came to the Executors, and therefore it is reason to charge them. And it is not like the Case in *Dier*, 10 *Eliz.* 271. *a.* where it is said, An Action of Debt will not lie against the Executor of a Keeper, nor an Escape, for there the body comes not to the Executor: And this very difference may be collected out of *Dier* in the place aforesaid; and the difference will stand where there is a personal wrong done to him, and where not. And for the Exception, That it doth not appear whether the *Fieri facias* was brought after the Record removed or not: To that they said *una voce*, that it appeareth that it was upon these words of Record, *viz.* That the Record was brought hither, and here remained; and it is not needful to shew, that Errour was brought, *&c.* Justice *Jones:* I conceive, that Debt will lie against the Sheriff, because the Sheriff had it delivered to him to deliver over. And if I deliver mony to deliver over, Debt will lie for him to whom it ought to be delivered. So in this Case. And because also the Defendant is discharged, and may plead the same, and therefore there is reason to charge the Sheriff. Farther, I conceive also, that it will lie against the Executors: And I shall take this difference, where the wrong is *ex maleficio*, for there it dieth with the person; and where *ex contractu*, for there it doth not die with the person. If I deliver goods to a man, and he dieth, an Action of Trover will lie against his Executors. And here the Sheriff could not have waged his Law, for the Debt is brought upon matter of Record, upon which wager of Law lieth not, but upon simple contract. And the Sheriff hath here made himself Debtor in Law upon Record. Justice *Crook:* It is reason to charge the Sheriff, because the Defendant is discharged, and may plead that his goods were taken in Execution by the Sheriff in satisfaction of the same Debt. And the Executors may be charged, because no wager of Law lieth, because the Debt is here brought upon matter of Record. And he agreed with Justice *Jones* in the difference betwixt *maleficium* and *contractum*. And therefore they did all conceive that the Action would lie. And in *Spekes* Case in the Common Pleas, it was voted, that the Action would lie against the Sheriff.

34. In

34. In a *Habeas Corpus*, the Case was thus: A man would erect a Tavern in *Birchin-lane*; and the Mayor and Communalty for his disobedience, because he would not obey them, but would erect a Tavern there against their wills, they knowing the same to be an unfit place, did imprison him. And the Opinion of the Court was, That he should be remanded, because that the Mayor and Communalty had authority over him, and they might appoint him a place in which he might erect his Tavern. For it is a disorderly Profession, and not fit for every place. And it was adjudged in this Court, That a Brewhouse ought not to be erected in *Fleet-street*, because it is in the heart of the City, and would be annoyance to it. And if one would set up a Butchers shop, or a Tallow-Chandlers shop in *Cheap-side*, it ought not to be, for the great annoyance that would ensue. And therefore the Mayor and Communalty may redress it. And therefore the party was remanded, and was advised by the Court to submit to the Government of the City. *Note*, the Recorder certified the Custom, That the Mayor might appoint a place.

35. Upon a Recovery in a Court-Baron, against one, he offered here to wage his Law. And Justice *Barckley* doubted whether wager of Law would lie in such Case: To which Justice *Jones* said, Yes; and *Barckly* agreed hereunto, because the Recovery was in a base Court, and not in a Court of Record. *Vide* 2 E. 4.

36. No antient Mill is Tithable; but Mills newly erected shall pay Tithes, by the Statute of 9 E. 2. 5.

Meade *against* Axe, *in a Writ of Error to reverse a Judgment.*

37. THe Case was: *Axe* brought an Action against *Meade* for th se words spoken of the Plaintiff, a Dyer, by the Defen-

Defendant, *Thou art not worth a Groat:* And the Plaintiff added, that these words amongst Citizens of such place where they were spoken, have the common acceptation, and doth *tant amount* as the calling of him Bankrupt. The Errors which were assigned by *Meade* Plaintiff in the Writ of Error were, 1. Because it is added, that the words were spoken *inter diversos ligeos*, and doth not say Citizens of the place where they have such acceptation. 2. Because that the Judgment is, *Considcratum est*, and the words *per Curiam* left out. And the Court was clear, that for these two Errors the Judgment should be reversed: But the Court was clear of Opinion, That the words of themselves are not actionable, and that the averment in this Case was idle and to no purpose, because the words of themselves imply a plain and intelligent sense and meaning to every man. And it was compared to the Cases, Where there is no Latine for words, there where words of no signification are put to express them, there they ought to be explained by an *Anglicè*; but where the words are significant, there needs not any *Anglicè*. Now if you will explain significant words under an *Anglicè*, contrary to the meaning and true intendment of the word it self, the *Anglicè* is void: So in our Case of Averment. The reason which was conceived wherefore the words of themselves are not Actionable, Because that many men in their beginnings are not worth a Groat, and yet their credit is good with the world. But if he had laid specially, *That he was damnified, and had lost his Credit, and that none would trust him*, upon this special matter, the words would be Actionable.

Bonds *Case.*

38. IN Trespass, the Plaintiff declared, That the Defendant entred in his Land, and did cut down and carry away two Loads of Grass in the Plaintiffs Soil, in a certain piece of Ground, in which the Trespass was supposed to be done, to strow the floor of the Church; and that he cut two Loads there

there, to eſtrew the floor of the Church, and did not ſay, that it is the ſame Treſpaſs, &c. And it was adjudged Error: But the Court was clear, that the Preſcription for cutting of graſs to eſtrew the Church, was good; becauſe it was but in the nature of an Eaſement. And ſo to have a waſhing-place in the land of another; and ſo the cuſtom here in *London*, to ſhoot in the land of another; and ſo for the Inhabitants of a town to have a way over the land of another to their Church. But Mr. *Rolls* who moved the Caſe at the Bar, ſaid, That it was adjudged, that Inhabitants of a town by cuſtom, ſhould have an Eaſement over the Freehold, or in the Freehold of a Stranger, but not profit Apprender: But, as I remember, the Plaintiffs Freehold lay near the Church, and for that reaſon the Court might conceive the ſame to be but an Eaſement. *Vide* 2 *H.* 3. cited by Juſtice *Jones*. *Vid. Gatewoods* Caſe, 6 *Rep.* 60. b.

Conysbies *Caſe*.

39. UPon the Leaſe of an Houſe, the Leſſee Covenanted that he would Repair the Houſe with convenient, neceſſary and tenantable Reparations. The Leſſor brought Covenant, and alleaged a breach of the Covenants, in not repairing for want of Tiles, and dawbing with Morter, and did not ſhew that it was not Tenantable. And the Opinion of the Court was, that he ought to have ſhewed it; for the houſe may want ſmall Reparations, as a Tile or two, and a little Morter, and yet have convenient, neceſſary and tenantable Reparations.

40. A Writ of Error was brought, and the Error aſſigned was, want of Pledges: And the Judgment was reverſed, although it was after Verdict. And ſo was it adjudged in Dr. *Huſſies* caſe, and *Young* and *Youngs* caſe, in this Court; and the Reaſon was given, becauſe that otherwiſe the King ſhould loſe his Amercement.

41. Fiſh in the River are not Titheable, if not by Cuſtome.

42. Two referred themſelves to Arbitrement, and the Arbitrators arbitrate, that one of them ſhould pay a certain ſum to the other; and the other in conſideration thereof ſhould acquit him of a Bond, wherein they both were bounden to a third perſon in a 100 *lib. & eo circiter*: and it was objected, That the Arbitrators had arbitrated a thing incertain, by reaſon of theſe words, *eo circiter*. But the Opinion of the Court was, That there was ſufficient certainty, becauſe that in this Caſe it doth not lie in their power to know the direct ſum, and becauſe a ſmall variation is not material: but if they (as in *Salmons* caſe 5 *Rep.*) will arbitrate that one ſhall be bound in a Bond to another, and not expreſs in what ſum, the ſame is utterly void, for the incertainty. Difference was taken where the Arbitrators arbitrate one party to do a thing which lieth in his power, and where not, without the help of a third perſon; there the Arbitrament is void: and in the principal Caſe, the difference was taken by the Court, where the Bond is forfeit, and the penalty is incurred, and where not, or the day of payment is not incurred, there payment at the day is a good diſcharge and acquittance, but where it is incurred, it is not. But Juſtice *Jones* ſaid, That he might compel the Obligee upon payment, although the Bond was forfeit, to deliver the Bond by *Subpœna* in Chancery; or that he ſuffer an Action to be brought againſt him, and then to diſcharge it, and pay it.

Goodman *againſt* VVeſt, *Debt upon the Statute of* 5 Eliz. *Cap.* 9.

43. THere was an action brought againſt the Plaintiff in the Common Pleas, who procured Proceſs to iſſue againſt the Defendant, for his Teſtimony in his Cauſe, and a Note of the Proceſs was left at the Defendants houſe, being ſixty miles from *London*, and twelve pence to bear his charges, which the party did accept. And the party who ſerved the Proceſs promiſed the Defendant ſufficient coſts. And here Mr. *Jones*, who was of Counſel with the Defendant, took three Excep-

Exceptions. 1. Becauſe the Proceſs was not ſerved upon the Defendant, as the Statute requires, but a Note only thereof, and it being a Penal Statute, ought to be taken ſtrictly. 2. There was but 12 *d.* delivered to the Defendant at the time of the ſerving of the Proceſs; which is no reaſonable ſum for coſts and charges according to the diſtance of place, as the Statute ſpeaks: and therefore the promiſe that he would give him ſufficient for his coſts afterwards is not good. 3. The party who recovers by force of this Statute ought to be a party grieved and damnified, as the Statute ſpeaks, by the not appearance of the Witneſs: and becauſe the Plaintiff hath not averred, that he had loſs thereby by his not appearance, therefore he conceived the Action not maintenable. For the firſt, the Court was clearly againſt him, becauſe it is the common courſe to put divers in one Proceſs, and to ſerve Tickets, or to give notice to the firſt perſons who are ſummoned, and to leave the Proceſs it ſelf with the laſt only; and that is the uſual courſe in Chancery, to put many in one *Subpœna*, and to leave a Ticket with one, and the Label with another, and the Writ with the third; and that is the common practice, and ſo the Statute ought to be expounded: But if there be one only in the Proceſs, there the Proceſs it ſelf ought to be left with the party. For the ſecond, the Court did conceive, That the acceptance ſhould bind the Defendant; but if he had refuſed it, there he had not incurred the penalty of the Statute. For he ought to have tendred ſufficient coſts according to the diſtance of the place, which 12 *d.* was not, it being 60 miles diſtant. But for the third and laſt Exception, the Court was clear of Opinion, That the Action would not lie for want of Averment, that the Plaintiff was damnified for the not appearance of the Defendant. And ſo it was adjudged that the Plaintiff *Nihil capiat per Billam.*

44. The Opinion of the Court was: That whereas one ſaid of another, *That he will prove that he hath ſtollen his Books*; that the words are actionable: for they imply an affir-

mative, and are as much as if he had said, *That he hath ſtollen my Books*. And ſo if I ſay of another, *That I will bring him before a Juſtice of Peace; for I will prove that he hath ſtollen*, &c. although the firſt words are not actionable, yet the laſt are.

Molton *againſt* Clapham.

45. THe Defendant upon reading *Affidavits* in Court openly in the preſence and hearing of the Juſtices and Lawyers ſaid, *There is not a word true in the* Affidavits, *which I will prove by forty Witneſſes*; and theſe words were alledged to be ſpoken maliciouſly. And yet the Court was clear of Opinion, that they will not bear Action. And the reaſon was, becauſe they are common words here, and uſual where an Action is depending betwixt two, for one to ſay, That the *Affidavit* made by the other is not true, becauſe it is in defence of his cauſe. And ſo it was here. The Defendant ſpake the words upon the reading of the *Affidavits* in a cauſe depending betwixt the Plaintiff and the Defendant. And therefore if I ſay, *That* J.S. *hath no Title to the Land*, if I Claim or make Title to the Land: Or if I ſay, *That* J.S. *is a Baſtard*, and entitle my ſelf to be right Heir, the words are not actionable, becauſe that I pretending Title, do it in defence thereof. And Juſtice *Barckley* ſaid, That there are two main things in Actions for words, the words themſelves, and *cauſa dicendi*, and therefore ſometimes, although that the words themſelves will bear Action, yet they being conſidered *cauſa dicendi*, ſometimes they will not bear Action. Now in our Caſe *cauſa dicendi* was in his own defence, or his Title, and therefore they will not bear Action.

46. Outlawry was reverſed for theſe two Errors. 1. Becauſe it was not ſhewed where the party Outlawed was inhabitant. 2. Becauſe it was ſhewed that Proclamations were made, but not that Proclamation was made at the Pariſh-Church where, &c.

Buckley

Buckley *againſt* Skinner.

47. THere was Exception taken, becauſe that the Defendant pleaded and juſtified the Treſpaſs *cum equis* and ſaid nothing to the Treſpaſs done *porcis & bidentibus*. And the Opinion of the Court was, That the Plea was inſufficient for the whole. And Juſtice *Jones* ſaid, That if ſeveral Treſpaſſes are done to me, and I bring Treſpaſs, and the Defendant juſtifie for one or two, and ſayeth nothing to the other, that the whole Plea is naught, becauſe the Plea is intire as to the Plaintiff, and the demurrer is intire alſo. But Juſtice *Barckley* was of Opinion, that the Plea was naught *quoad*, &c. only; and that Judgment ſhould be given for the other. *Vide* 11. *Rep.* 6. b. *Gomerſall* and *Gomerſalls* Caſe.

48. A man pleaded a deſcent of a Copy-hold in Fee: The Defendant to take away the deſcent pleaded, That the Anceſtor did ſurrender to the uſe of another, *abſque hoc*, that the Copy-holder died ſeiſed. And the Opinion of the Court was, That it was no good traverſe, becauſe he traverſed that which needed not to be traverſed; for being Copy-hold, and having pleaded a ſurrender of it, the party cannot have it again if not by ſurrender. Like the Caſe of a Leaſe for years, *Helliers Caſe*. 6 *Rep.* 25. b. For as none can have a Leaſe for years but by lawful conveyance, ſo none can have a Copy-hold Eſtate, if not by ſurrender: But if a man plead a deſcent of inheritance at the Common Law, there the defendant may plead a feoffment made by the Anceſtor *abſque hoc*, that he died ſeiſed, becauſe he may have an eſtate by diſſeiſin after the feoffment. Traverſe of the deſcent, and not of the dying ſeiſed, is not good; ſo was it adjudged in this Court. *Vide* 24 *H.* 8. *Dyer.*

49. It was moved in Arreſt of Judgment upon an Action of Treſpaſs upon the Statute of 2 *E.* 6. *cap.* 13. becauſe that the Plaintiff ſaid, that the Defendant was Occupier only, and did.

did not ſhew how he occupied, or what intereſt he had. And the clear Opinion of the Court was, that he need not, becauſe here he makes no Title; and whoſoever it be that taketh the Tithe is a Treſpaſſer. And therefore Juſtice *Jones* ſaid, That it was adjudged in this Court, that an Action lieth againſt the diſſeiſor for the Tithes: ſo againſt a ſervant: and ſo if one cut them, and another carry them away, an Action lieth againſt any of them.

50. The Pariſh of *Ethelburrow* in *London* alledged a cuſtome, that the greater part of the Pariſhioners have uſed to chooſe their Church-wardens; and they choſe two, the Parſon choſe a third. The Official of the Biſhop gave Oath to one of them choſen by the Pariſh, but refuſed to ſwear the other, and would have ſworn the party choſen by the Parſon, but the Pariſh was againſt it; upon which the Parſon Libelled in the Eccleſiaſtical Court. And a Mandat was here praid, That the Official ſwear the other who was choſen by the Pariſh; and a Prohibition to ſtay the Suit in the Eccleſiaſtical Court. Upon the Mandat the Juſtices doubted, and deſired that Preſidents and Records might be ſearched; and at length, upon many Motions, Preſidents and Records ſhewed, a Mandat was granted. But there being Suit in the Eccleſiaſtical Court, by the other whom the Parſon choſe, a Prohibition was granted without any difficulty: But at firſt the Counſel prayed a Prohibition for not ſwearing the other; which the Court refuſed to grant, becauſe there was no proceeding in the Eccleſiaſtical Court, and a Prohibition cannot be granted where there is no proceeding by way of Suit.

Vaughan *againſt* Vaughan; *in Action upon the Caſe upon* Aſſumpſit.

51. THe Defendant did promiſe that he would make ſuch a Conveyance of certain Lands: and pleaded, That he had made it, but did not ſhew the place where it was made:

made: And the Court was clear of Opinion, that he need not; for it ſhall be intended upon the Land. And ſo in caſe of performance of Covenants, it is not needful to ſhew the place where, *&c.*

Norrice *and* Norrices *Caſe.*

52. COpy-holder for life, where the cuſtome is, That if the Tenant die ſeiſed, that he ſhall pay a Heriot: The Lord granted the Seigniory for 99 years, if the Tenant ſhould ſo long live: And after that he made a Leaſe for 4000 years. Tenant for Life is diſſeiſed, (or more properly, ouſted) and died. Here were two Queſtions: 1. Whether there were any Heriot to be paid, and admitting there were, yet who ſhould have it, whether the Grantee for 99 years, or he who had the 4000 years? And the Court was clear of Opinion in both points without any argument, 1. That a Heriot was to be paid, notwithſtanding that the Tenant did not die ſeiſed, becauſe he had the eſtate in right, and might have entred, although he had not the poſſeſſion. And Juſtice *Barckley* compared it to the Caſe in *C.* 3. *Rep.* 35. a. in *Butler* and *Bakers* Caſe, where a man hath one acre of Land holden in *Capite*, and a hundred acres of Socage Land, and afterwards he is diſſeiſed of the *Capite* Land, and afterwards makes his will of all his Socage Land, in that caſe he is a perſon having of *Capite* Land, as the Statute ſpeaks. And yet that right of *Capite* Land ſhall make the deviſe void for the third part; for notwithſtanding the diſſeiſin, yet he is Tenant in Law. And as to the ſecond point, the Court was clear of Opinion alſo, That he in remainder, or he that had the Eſtate for 4000 years (for note the Action was brought by him in the Remainder for the Heriot) ſhould not have it: And their reaſon was, becauſe the Tenant for life was not the Tenant of him who had the future intereſt of 4000 years, but of him who had the intereſt for 99 years. But they were not clear of opinion, that the Grantee for 99 years ſhould have the Heriot. Juſtice *Barckley* was, that the Grantee for

for 99 years should have it. But Justice *Jones* (there being then none in Court but they) *hæsitavit*. And the reason of the doubt was, because that *eo instante* that the Tenant died, *eodem instante*, the estate of the Grantee for 99 years determineth. Justice *Jones* put this Case: A Seigniory is granted for the life of the Tenant, the remainder over in fee; the Tenant dieth, Who shall have the Ward? Justice *Barckley* said, he who is Grantee of the particular estate: but *Jones* seemed to doubt it. *Vide* 44 E. 3. 13.

Lewes *against* Jones *in a Writ of Error.*

53. JUdgment was given for *Jones* against *Lewes* in an Action brought in the Common Pleas: And *Lewes* here brought a Writ of Error, and assigned for Error, That he was an infant at the time of the Action brought against him; And that he appeared by Attorney, whereas he ought to appear by Guardian, or *procheine amy:* The defendant pleaded in avoidance of this Writ of Error, That there was no Warrant of Attorney. The Plaintiff *allegando*, shewed the Error before; And the Defendant pleaded *in nullo erratum est*. And the Judgment was reversed. But the Opinion of the Court was, That the better way had been for the Plaintiff to have demurred in Law: for there being no warrant of Attorney, there was no appearance at all; and so are the Books, 38 E. 3. and 14 E. 4.

54. In *Utburt* and *Parhams* Case, it was agreed, That a man may be Non-suit without leave of the Court, but he cannot discontinue his Suit without consent of the Court.

Davis *and* Bellamies *Case in Attaint.*

55. THe Defendant brought Attaint, and the Verdict was affirmed; and Costs prayed upon this Rule, that

that where the Plaintiff ſhall have coſts, there the Defendant ſhall have coſts: But they were denied by the Court; for that ought to be taken in the original Action, and not in caſe of Attaint; But upon the *reſtituatur*, there coſts ſhall be given; but that is in the original Action.

56. If two joynt-tenants be of a Rectory, and one ſueth for Tithes by himſelf only; it is no cauſe of Prohibition: So if a Feme Covert ſue ſolely upon a defamation, a Prohibition ſhall not be granted.

57. The Sheriff of a County made a Warrant *Ballivis ſuis*, to arreſt the body of ſuch a man; and the Bayliffs of the Liberty return a Reſcous. And Exception was taken to it, becauſe that the Warrant was, *Ballivis ſuis*; and the Return was made by thoſe who were not his Bayliffs; and it was adjudged: for the Liberty might be within his Bayliwick, and ſo are all the Preſidents. And there was another Exception, becauſe the place of the Reſcous was not ſhewed, and for that the Book of 10 E. 4. was cited; for there the Reſcous was, *adtunc & ibidem*, and did not ſhew the place. To that it was anſwered by the Court, and agreed, that *adtunc & ibidem* is altogether incertain, if the place be not ſhewed; but in the principal Caſe, the place was ſhewed at the firſt, and always after; that *tunc & ibidem* only without naming of the place, and adjudged good. For that *tunc & ibidem* throughout the Declaration, hath reference to the place firſt ſhewed; and it was adjudged good.

58. Outlawry was reverſed for this Error, becauſe that the Exigent was, *Secund' exactus ad Com' meum ibidem, &c.*

59. A Hundred may preſcribe in *Non decimando*, and it is good; for it is the cuſtome of the County, which is the beſt

Law which ever was. But a Pariſh or a particular Town cannot preſcribe in *Non decimando*: And thereupon a Prohibition was granted. And a Prohibition was granted in this Court, upon this ſurmiſe, That the Cuſtome was, that Tithes ſhould not be paid of Pheaſants.

60. If there be no *Venire facias* it is not Error, but it is helped by the Statute: But if there be a *Venire facias*, and it is erroneous, it is not holpen by any Statute.

Trinity-Term, 15° CAROLI, in the Kings Bench.

61. A Man indicted others at the Seſſions-houſe in the *Old-Baily*, who were acquitted; and the Defendants Counſel did remove the Indictment into the Kings Bench, and prayed a Copy thereof, to the end they might bring a Conſpiracie, or have other remedy for the wrong done unto them. And it was denied by the whole Court, unleſs the Recorder will ſay, That there appeared malice in the proſecution: For a man ſhall not be puniſhed for lawful proſecution upon juſt ground without malice, although the parties be acquitted by Law.

The King *againſt the Inhabitants of* Shoreditch.

62. MAſter *Keeling* Clerk of the Crown in the Kings Bench did exhibit an Information againſt the Inhabitants of *Shoreditch* for not repairing the High-way. And the Iſſue was, Whether they ought to repair it or no? And it was ſaid by the Court, That by the Common Law, the Inhabitants of a Pariſh ought to repair all High-ways lying within the Pariſh, if preſcription did not bind ſome particular

cular perſon thereto; which was not in this Caſe. And in this Caſe ſome of the Inhabitants would have been Witneſſes to prove that ſome particular Inhabitants lying upon the Highway had uſed time out of minde to repair it, but were not permitted by the Court, becauſe they were Defendants in the Information; wherefore the Jury found, That the Inhabitants ought to repair the way.

63. Two men and their wives were Indicted upon the Statute of Forcible Entry, who brought a *Certiorari* to remove the Indictment into the Kings Bench. Some of them did refuſe to be bound to proſecute according to the Statute of 21 *Jac. c.* 8. and therefore, notwithſtanding the *Certiorari*, the Juſtices of Peace did proceed to the trial of the Indictment: and here it was reſolved, That whereas the Statute is, The parties Indicted, *&c.* ſhall become bound, *&c.* That if one of the parties offer to find Sureties, although the others will not, yet that the cauſe ſhall be removed; for the denying of one or any of them ſhall not prejudice the other of the benefit of the *Certiorari*, which the Law gives unto them: And the Woman cannot be bounden. And it was farther reſolved, that where the Statute ſaith, That the parties Indicted ſhall be bound in the ſum of ten pounds, with ſufficient Sureties, as the Juſtices of the Peace ſhall think fit, that if the Sureties be worth ten pounds, the Juſtices cannot refuſe them, becauſe that the Statute preſcribes in what ſum they ſhall be bound. Like to the Caſe of Commiſſion of *Sewers*, 10 *Rep.* 140. a. That where the Statute of 3 *H.* 8. *cap.* 5. enables them to ordain Ordinances and Laws according to their wiſdoms and diſcretions, that it ought to be interpreted according to Law and Juſtice. And here it was farther reſolved, that after a *Certiorari* brought, and tender of ſufficient Sureties, according to the Statute, all the proceedings of the Juſtices of Peace are *coram non Judice*.

The Argument of the Lord Chief Juſtice, in the Caſe between James *and* Tintny, *in a Writ of Error to reverſe Judgment given in the Common Pleas for* Tintney *Defendant, in a* Replevin *brought by* James: *the Caſe was thus*, viz.

64. STowel was Lord of a Mannor, and *James* one of the Tenants, and there the cuſtome was, That the Steward of the Mannor might make Laws and Ordinances for the well-ordering of the Common. And the cuſtome was alſo to Aſſeſs a penalty or a pain upon thoſe who brake thoſe Laws and Ordinances. And alſo to preſcribe to diſtrain for the penalty. The Steward made an Ordinance, That he who put his Cattle beyond ſuch a bound, that he ſhould pay 3 *s.* 4 *d.* *James* offended againſt this Ordinance, upon which the penalty was aſſeſſed, and a diſtreſs taken by *Tintny* Defendant in the *Replevin*, Plaintiff and Baily of the Lord of the Mannor; And Judgment was given for him in the Common Pleas, and damages aſſeſſed: Upon which a Writ of Error was brought. In this Caſe it was agreed by the whole Court, that the Cuſtom was reaſonable: And the difference taken where the Law or Ordinance takes away the whole profit of the Commoners, and where it abridgeth it only, or adds limits or bounds to it, as in this Caſe. And farther it was agreed, That the Commoners are bound to take notice of theſe Ordinances. But in this Caſe, the Error which was aſſigned was this, That damages were given for the Defendant, where no damages ought to have been given: And of that Opinion was the Lord chief Juſtice, that no damages ought to have been given; and with him agreed Juſtice *Jones*; but Juſtice *Crook* and Juſtice *Barckley*, *è contra*. It is clear, that at the Common Law, the Defendant ſhall not have damages, although as to ſome intent the Avowant be as it were a Plaintiff and Actor. 21 *H.* 6. 2. 6 *H.* 4. 11. 35 *H.* 6. 47. Then the Queſtion ariſeth only upon theſe two Statutes, *viz.* 7 *H.* 6. *cap.* 4. 21 *H.* 8. *c.* 19. And firſt, whether our Caſe be within the Letter of theſe Laws

Laws; Admitting that not, Whether within the miſchief, ſo as that it ſhall have the ſame remedy. And I conceive, it is not within the Letter or Equity of theſe Statutes: Not within the Letter; for they ſpeak, Where a man diſtrains for Rents, Cuſtoms and Services, or damage feaſant. And in our Caſe, he doth not diſtrain for any of them; for it is manifeſt, that he doth not diſtrain for Rents, Services, or Damage feaſant: And it is as clear, that he doth not diſtrain for Cuſtoms; for he diſtrained for a penalty aſſeſſed by Cuſtom. 1. In *Alcocks* caſe it was here reſolved, That where a preſcription was alledged to diſtrain for an Eſtray, and found for the Avowant, that no damages ſhould be in that caſe. For it was here reſolved, that the Cuſtoms intended in 21 *H.* 8. *cap.* 19. are Cuſtoms which are Services. 2ly. I hold it not within the Equity; for the miſchief at the Common Law was, That damages were not to be recovered for ſuch Rents, Services, *&c.* And this penalty is no Service. And I conceive clearly, That it was not the meaning of the Makers of the Act of Parliament to extend to ſuch penalties. And here I further take the difference which is in *Pilfords* caſe in the 10 *Rep.* 116. In all caſes where a man at the Common Law cannot recover damages: If a Statute give damages, there he ſhall recover no coſts; for the ſame is an Act of Creation, which gives remedy where none was given before. But where there is an Act of Addition, which increaſeth the damages at the Common Law, there notwithſtanding he ſhall recover coſts alſo. So in our Caſe, theſe being Acts of Creation which give remedy where there was no remedy before, ſhall be taken ſtrictly according to the Letter, and ſhall not extend to ſuch penalties as in our caſe: And upon this difference he cited the Caſes in *Pilfords* caſe, and eſpecially the Caſe upon the Statute of 5 E. 6. of Ingroſſers; the Plaintiff ſhall not recover coſts, but only the penalty given by the Statute grounded upon 37 *H.* 6. 10. I agree, That there be many Preſidents in the Common Pleas, That damages have been allowed in our very Caſe; but that is the uſe of the Clerks, and paſſed *ſub ſilentio*, without any ſolemn debate or controverſie. *Vide Greiſlies caſe*, and the firſt Caſe

Caſe of the Book of Entries, Preſidents and Judgments in this Court. *Paſch.* 33 *Eliz. Rot.* 292. *Haleſworth* againſt *Chaffely*. A Judgment of the Common Pleas was reverſed for this very point. *M.* 36 *Eliz. Ruddal* and *Wilds Caſe*. *M.* 44 & 45 *Eliz. Rot.* 22. *Shepwiths Caſe*. Avowry for relief a ſtronger caſe, Judgment was reverſed, becauſe damages was aſſeſſed, *Hill.* 14 *Jac. Rot.* 471. *Leader* againſt *Standwell* in a *Replevin*. Avowry was made for an Amercement in a Leet, and found for the Defendant, and damages aſſeſſed. But the Entry upon the Record was thus, *Super quo nullo habito reſpectu, &c.* The Plaintiff was diſcharged of the damages, becauſe *nulla damna debent eſſe adjudicanda per Legem terræ*; but he ſhall have his coſts. But it was objected by Juſtice *Crook*, That by the Statute of 4 *Jac. c.* 3. which giveth coſts and damages to the Defendant in certain Actions there ſpecified where the Plaintiff ſhall recover damages, and that where the Plaintiff is Non-ſuit, or verdict paſs againſt him, That Demurrer hath been conſtrued to be within that Statute. Notwithſtanding that it is an Act of Creation, I agree that: and anſwer, that Demurrer is within that Statute, and the miſchief of it, but it is not ſo in our Caſe; for in our Caſe there is no ſuch miſchief: For there is no colour to extend it beyond the words of the Statute. For which cauſe I conclude that the Judgment in this caſe ought to be reverſed.

65. A Clerk of the Court dwelling in *London* was choſen Churchwarden, and prayed a Writ of Priviledge, which was granted. And it was agreed by the whole Court, That for all Offices which require his perſonal and continual attendance, as Churchwarden, Conſtable, and the like, he may have his Priviledge; but for Offices which may be executed by Deputy, and do not require attendance, as Recorder and the like; (from which the Juſtices themſelves ſhall not be exempt) for them he ſhall not have his Priviledge. And where he hath his Priviledge, for the not obeying thereof, an Attachment lieth.

Swift

Swift *againſt* Heirs, *in Debt upon the Statute of* 2 E. 6. *for ſetting out of Tythes.*

66. THe doubt in this Caſe did ariſe upon two ſeveral Indentures found by ſpecial verdict, which were made by the Vicar and Subchauntors Corrols of *Lichfield*, one 2 *E.* 6. the other 2 & 3 *Phil.* & *Mar.* The Queſtion upon the Indenture of 2 *E.* 6. was, Whether the Grant upon the *Habendum*, be a grant of a Freehold to begin at a day to come, or not. The chief Juſtice, Juſtice *Crooke*, and Juſtice *Barckley*, were clear of Opinion, That it was a grant of a Freehold to begin at a day to come. And for that the Caſe is thus: In the Indenture of 2 *E.* 6. there is a recital of a former Leaſe for years: And by this Indenture in 2 *E.* 6. another Leaſe was to begin after the firſt Leaſe determined, the remainder in Fee to another: And upon that the three Juſtices before were clear in their Judgments, That it was a Grant of Freehold to begin at a day to come, which without doubt is void, 8 *H.* 7. 39 *H.* 6. and *Bucklers* caſe, 3 *Rep.* And in 8 *H.* 7. the difference is taken betwixt the grant of a Rent in *eſſe*, and Rent *de novo*. A Rent *de novo* may be granted *in futuro*, but not a Rent which is in being. But Juſtice *Jones* in this Caſe was of Opinion, That here is not any grant of a Freehold to begin at a day to come, becauſe in this caſe the Leaſe doth begin preſently, becauſe the Leaſe recited is not found by the Jury, and therefore now it is all one as if there had been no Leaſe at all; contrary in the caſe of the King, becauſe it paſſeth a good eſtate of Inheritance to the Grantee. And therefore if I make a Leaſe for years unto a man after the expiration of ſuch a Leaſe, where in truth there is no ſuch Leaſe in being, the Leaſe ſhall begin preſently. The Queſtion upon the Indenture of 2 & 3 *P.* & *Mar.* was no more but this. The Vicar and Subchauntors of *Lichfield* made a Grant of all their Tithes in *Cheſterton*, and name them in certain, and in *ſpecie*, as Tithe-wool, Tithe-Geeſe, Pigs, Swans, and the like, and that in a diſtinct clauſe, with eſpecial Exception of four certain things. After which came

came this clauſe, All which were in the Tenure of *Margaret Petoe*: And the Jury found that none of theſe Tithes were in her Tenure: And whether that Grant were void or not, was the Queſtion; And reſolved by the whole Court *nullo contradicente*, That the Grant notwithſtanding this falſe recital, was good, for theſe reaſons. But firſt it was reſolved, That where they grant all their Tithes in *Cheſterton*, that it is a good grant, and hath ſufficient and convenient certainty, 13 E. 4. and *Hollands Caſe*: There are two Generalities, 1. Abſolute. 2. General in particular; ſo here. And in our Caſe it is as certain, that demand in an Action may be for them by the name of all their Tithes in *Cheſterton*. So in the like manner an Action of *Ejectione firme* will lie: For an *Ejectione firme* will lie for Tithes, as it hath been adjudged here. If the King grant all his Lands, it is altogether incertain and void; but if the King grant all his Lands in *Dale*, or which came to him by the diſſolution of ſuch an Abby, it is good, becauſe it is a generalty in particular. And it was agreed, that convenient certainty is ſufficient: And therefore it was ſaid by Juſtice *Jones*, That if I grant all my Rents in *Dale* which I have of the part of my Mother, that he conceives the ſame to be good. The firſt reaſon wherefore this grant ſhall be good notwithſtanding the falſe recital, was this, becauſe the words here, All which, *&c.* are not words of denotation or reſtriction, but of ſuggeſtion or affirmation, and therefore ſhall not make void the Grant. And here the difference was taken between the Caſe of a common perſon, and of the King; Suggeſtion which is falſe in the Caſe of the King, makes the Patent void; but contrary in the caſe of a common perſon: And therefore if the King be deceived either in point of profit or in point of Title, his Grant is void, 9 *H.* 6. Where he is not deceived in point of profit, he ſhall not avoid the Grant. 26 *H.* 8. The ſecond reaſon, That a Deed ought to be conſtrued *Ut res magis valeat quam pereat*, 34 *H.* 6. A man having a Reverſion, deviſeth his land in *Manibus*, thereby the Reverſion paſſeth, 9 E. 4. 42. Releaſe of all Actions againſt Prior and Covent, ſhall be conſtrued and intended all Actions againſt the Prior only,

only, for an Action cannot be brought againſt the Covent. Farther, by this conſtruction you would avoid this deed; and by the Rule of Law, the deed and words of every man ſhall be taken very ſtrong againſt himſelf, *ut res magis valeat*, as is ſaid before. And it is againſt reaſon to conceive that it was the meaning of the parties that nothing ſhould paſs. A third reaſon was, becauſe the grant was a diſtinct clauſe of it ſelf. And the words which were objected at the Bar to be reſtrictive, were in another diſtinct clauſe, and therefore ſhall not reſtrain that which was before; for words reſtrictive ought to be continued in one and the ſame ſentence: Wherefore they having granted all their Tithes in *Cheſterton* by one clauſe, the falſe recital afterwards in another clauſe ſhall not make the grant void. See 3 & 4 *Eliz. Dyer in Waſt*, 31 *Eliz.* the Lord *Wenworths* Caſe in the Exchequer upon this Rule of diſtinct clauſes: And *Atkins* and *Longs* caſe in the Common Pleas, upon which caſes Juſtice *Jones* did rely. The fourth reaſon was, That conſtruction ought to be made upon the whole Deed: And it appeareth by the context of the Deed, That it was the meaning of the parties to grant the Tithes by the Deed. Further, the Exception of the four things ſheweth, That it was the meaning of the parties to grant all things not excepted, as the Tithes in this Caſe; For *exceptio firmat Regulam*; And to what purpoſe ſhould the Exception be, if they did not intend to paſs all other things not excepted? See 4 *Car. Hoskins* and *Trencars Caſe*, Sir *Robert Napwiths Caſe*, 21 *Jac.* cited by the chief Juſtice to that purpoſe. Wherefore it was agreed by the whole Court, that Judgment ſhould be given for the Defendant. And the Opinion of the Court was clear alſo, That although ſome of the Tithes had been in the Tenure of *Margaret Petoe*, that yet the grant was good. And that was after Argumen upon the Demurrer, to avoid all ſcruples to be after made by Counſel; becauſe it was conceived, That ſome of the Tithes were in her Tenure.

Criſp *againſt* Prat *in* Ejectione firme.

67. THe Caſe upon the four Statutes of Bankrupts, *viz.* 34 *H.*8. 13 *Eliz.* 1 *Jac.* and 21 *Jac.* was thus: *Ralph Briſco* 9 *Jac.* purchaſed Copyhold to him and his Son for their lives, the Remainder to the Wife in Fee. 11 *Jac.* he became an Inholder; and about twelve years after, a Commiſſion of Bankrupt is obtained againſt him; And thereupon the Copyhold-land is ſold by the Commiſſioners to the Defendant. *Ralph Briſco* dieth, and his Son *John Briſco* entred, and made the Leaſe to the Plaintiff: The Defendant entred upon him, and he brought an *Ejectione firme*. And Judgment was given upon ſolemn argument by the Juſtices for the Plaintiff. The firſt point was, Whether an Inholder be a Bankrupt within theſe Statutes: And it was reſolved by all the Juſtices, *viz.* *Jones*, *Crook*, *Barckley*, and *Bramſtone* chief Juſtice, that an Inholder *quatenus* an Inholder is not within theſe Statutes: Juſtice *Barckley* and Juſtice *Jones*, one grounded upon the ſpecial Verdict, the other upon the Statutes, did conceive, That an Inholder in ſome caſes might be within theſe Statutes. Juſtice *Barckley* did conceive upon this ſpecial Verdict, that this Inholder was within them; becauſe it is found, That he got his living by buying and ſelling, and uſing the Trade of an Inholder. And he conceived upon theſe words, Buying and ſelling in the verdict, and getting his living thereby, although that the Jury have alſo found him an Inholder, that the ſame is within the Law. And he agreed, That he who liveth by buying or ſelling, and not by both, is not within the Law; but in our caſe the Jury have found both, And it hath been adjudged, That he who buys and ſells cattle, and ſtocks his ground with them, that he may be a Bankrupt within thoſe Statutes. I agree, that a Scrivener was not within 13 *Eliz.* for he doth not live by buying and ſelling, but by making uſe of the monies of other men; but now he is within 21 *Jac.* But in our caſe the Inholder buys his graſs, hay, and grains, and proviſion alſo for his Gueſts, and by ſelling of them he lives. But he agreed,

agreed, That if the Jury had found, that he was an Inholder only, and not that he did get his living by buying and ſelling, that in that caſe, he was out of the Law: And for theſe reaſons, he did conceive, That this Inholder, as by the ſpecial Verdict is found, was within the Statutes of 13 *Eliz.* and 21 *Jacobi*. Juſtice *Jones:* An Inholder may be, or not be within theſe Laws upon this difference. That Inholder who gets his living meerly by buying and ſelling (as many of the Inholders here in *London* do) they are within theſe Statutes: But thoſe who have Lands of their own, and have hay and grain and all their proviſions of their own, as many have in the Country; thoſe are not within the Statutes. Farther he ſaid, That buying and ſelling doth not make men within theſe Statutes, for then all men ſhould be within the Statutes; but they ought to be meant of them who gain the greateſt part of their living thereby, and live chiefly or abſolutely thereby. But *Bramſton* chief Juſtice, and Juſtice *Crook* were clear of Opinion, that an Inholder could not be a Bankrupt neither by the Statutes, nor according as it is found by the ſpecial Verdict. And their reaſon was, becauſe that an Inholder doth not live by buying and ſelling, for he doth not ſell any thing, but utter it: He which ſells any thing doth it by way of contract; but an Inholder doth not contract with his Gueſts, but provides for them, and cannot take unreaſonable rates, as he who ſells may; and if he doth, he may be Indicted of Extortion, which the ſeller cannot. Wherefore they concluded, that an Inholder is not within the Statute of 13 *Eliz.* & 1 *Jac.* Juſtice *Crook* remembred theſe Caſes; *Webb* an Inholder of *Uxbridge* brewed in his houſe, and ſold his Beer to his Gueſts: And it was adjudged in the Exchequer, that it was not within the Statute of Brewers. And *Bedell's* Caſe, who being a Farmer bought and ſold cattle; and adjudged, that he was not a Bankrupt within theſe Statutes. And he put theſe caſes upon this reaſon, That where the Statutes ſaid, Get their living by buying and ſelling, that it ought to be for the greater part; that they gain the greater part of their living thereby. And he ſaid, that if a Gentleman buy and ſell Land he is not within

the Statutes; for it ought to be taken, thoſe who buy and ſell perſonal things. The ſecond point. It was agreed by all, that Copyhold is within the Statute of 13 *Eliz.* & 1 *Jac.* Firſt, becauſe it is no prejudice to the Lord, becauſe there ought to be compoſition with the Lord, and the Vendee; And although the ſale ought to be by Indenture, yet the Vendee ought to be admitted by the Lord. And the difference in *Heydons* caſe in 3 *Rep.* was agreed. Secondly, It is expreſly within 13 *Eliz.* and therefore within 1 *Jac.* alſo by way of recital, although the Statute of 1 *Jac.* hath new proviſions. And by the Statute of 21 *Jac.* it was ſaid, That theſe Statutes ſhall be conſtrued moſt beneficial for the Creditors, becauſe their ground is *ſuum cuique tribuere*, 5 *Eliz. Dyer. Umpton* and *Hides Caſe*, The Acts of Explanation ſhall be taken moſt beneficial and liberally. And the Statute of 13 *Eliz.* ſays expreſly, That the Commiſſioners ſhall diſpoſe of Lands, as well Copy as Free. But although a Copyhold be not within the later part of 13 *Eliz.* expreſly, yet by connexion it is. And the Statute of 13 *Eliz.* guides the Statutes 1 & 21 *Jacobi.* Juſtice *Jones* did agree, That the Copyhold is within 13 *Eliz.* but not the perſon of the Copyholder, although the perſon be within 1 *Jac.* And the chief Juſtice ſaid, That his Opinion was, that upon the Statute of 21 *Jac.* which is, That theſe Statutes ſhall be taken liberally: That Copyholds, although they had not been named, had been within theſe Statutes. It was ſaid by Juſtice *Barckley*, who argued for the Defendant, That the verdict hath not found within 13 *Eliz.* becauſe the verdict hath not found fraud expreſly, but badges only thereof. See *Meriel Littletons Caſe* in the Chancellor of *Oxfords Caſe*, That the Fraud ought to be expreſly found, but ſo it is not here; for here it is found, that the Son was an Infant at the time of the purchaſe; and alſo that the purchaſe was with the mony of the Father, which are only inducements of Fraud: But he argued it was within 1 *Jac.* becauſe the Father hath cauſed or procured this conveyance to his child, as the Statute ſpeaks. And here is Fraud apparent, *Et quod conſtat clarè non debet verificari.* And therefore if a man enfeoff his Son, it is Fraud appa-

apparent,& ought not to be found particularly. But it was reſolved by all the other Juſtices, That here was not fraud apparent, and therefore it ought to be found by the Jury. The third and chief point in this Caſe was, If being no Inholder at the time of the purchaſe, and afterwards becoming an Inholder, whether he were within the Statute of 13 *Eliz.* And it was reſolved he was not. But here Juſtice *Barckley*, who argued for the Defendant, was againſt it. And he argued, that if a man purchaſe and ſell, and afterwards become a Tradesman and Bankrupt, that that was not within the Statute; but if he keepeth the Land in his hands, there he conceived him within the Statute, as it was in this caſe. And he was againſt the Book of the Chancellor of *Oxfords Caſe*, of relation to deveſt the Advowſon; and he ſaid, It is not like to the Caſe in 6 & 7 *Eliz.* there cited. In *Eriches Caſe* in the 5 *Rep.* there is a Rule taken, that *A verbis legis non eſt recedendum*; and in our Caſe it is within the expreſs words of the Statute, which are, *That if any perſon which hereafter ſhall become a Bankrupt*, &c. And here, he after became a Bankrupt. But it was reſolved by the others, with whom Juſtice *Barckley* did concur after, that it was not within the Statute. Juſtice *Crook* argued, That it is not within the words of the Statute, which are, If the offender purchaſe, and that the ſale ſhall be good againſt the offender: and here, he was not offender at the time of the purchaſe; and uſing no Trade, ſhall he be puniſhed for that after? Beſides, here the ſon ſhould be puniſhed for the offence of the Father, which the Law of God will not ſuffer. *Smith* and *Cullamers Caſe*, 2 *Rep.* he ought to be endebted at the time, otherwiſe he is no offender; And he might give away his goods before he was in Debt. And the miſchief here will be, That Lands purchaſed 40 years before ſhould thereby be defeated. And I hold, that if a man be a Tradeſman, and afterwards leaves his Trade, and then purchaſeth, and afterwards becomes a Tradeſman again, and a Bankrupt, that he is not within the Statute. But Juſtice *Jones* was of opinion, that if he be a Tradeſman at the time although not an offender, yet he is within the Statute. But the chief Juſtice

ſtice did argue, that he ought to be an offender, and the thing which makes him to be an offender is his intent to defraud his creditors. *Jones:* It ſhall be hard in this Caſe to cauſe the eſtate to be reached by this Statute, for perhaps it was for the marriage of the ſon, and perhaps the ſon might ſell it, and after the father become Bankrupt, it would be hard to void the ſale. The Chancellor of *Oxfords* caſe was a ſtronger caſe, for there the party was Indicted. And if a man be Accomptant to the King, and afterwards ſell, yet the ſale ſhall be avoided by the King. But if he be not accomptant and ſelleth, and afterwards becomes Accomptant, the ſale ſhall not be defeated. And here he became Inholder after the purchaſe, and being a clear man at the time of the purchaſe, he ſhall not now be within the Statute. Chief Juſtice: If that ſhould be permitted, all things which the party did ſhould be defeated; and therefore he agreed, That although he be a Tradeſman, yet if he be not in debt; if he purchaſe for another, or give unto another, if no fraud be found, it is not within the Statutes. And Judgment accordingly was given for the Plaintiff.

Young *againſt* Fowler.

68. YOung brought an Action upon the Caſe againſt *Fowler* for diſturbing of him to execute the Office of Regiſter to the Biſhop of *Rocheſter*; and upon *Not guilty*, pleaded: the Jury gave a ſpecial verdict. They found that the Office was granted by one Biſhop to one for life, which was confirmed by the Dean & Chapter; which Biſhop died, and afterwards *John Young* was created Biſhop. And then they found that the Office was grantable in Reverſion time out of mind, *&c.* And that *John Young* Biſhop did grant the ſaid Office of Regiſter to *John Young* his ſon now Plaintiff in Reverſion. (And that the Office was to be executed by the ſaid *John Young* or his Deputy) which *John Young* the ſon was but of the age of 11 years at the time of the Grant; but they found that he was of full age before the Tenant for life died. And then they found that *John Young* the Biſhop died; and that his Succeſſor granted the

the Office to the Defendant, who executed many things concerning the Office: And whether upon the whole matter the Defendant were a disturber or not, was the Question: And it was adjudged by all the Justices without any solemn and open argument, that the Defendant was a disturber: But the case was argued by Counsel on both sides, whose arguments and reasons were briefly following. *Maynard* for the Plaintiff; There are two points. 1. Whether the grant be good within the Statute of 1 *Eliz.* 2ly, Whether the Grant to an Infant be good: And he held it was, because it was to be executed by his Deputy. The word of the Statute of 1 *Eliz.* are, [*Of any thing belonging to the Bishoprick*] and in our Case the Office of Registry is belonging to the Bishoprick. The second doubt is, Whether the Grant in Reversion be convenient; and I hold it is, although not absolutely, yet necessarily: And therefore we are to see, 1. What conveniencie is requisite; and 2. Whether such conveniencie be within the Law: For that, it ought to be enquired, How this office hath used to be granted, and the use ought to guide the conveniencie. See the Bishop of *Salisburies Case*; a grant of an Office to two, which hath not been used to be so granted, is not good. *Pasc.* 1 *Car. Rot.* 207. the Bishop of *Chichesters Case*. Where the Question was upon the usual Grant of Fees: and there because it was found that there was a grant of greater Fees than the use and custome warranted; It was adjudged good for so much as the custom did warrant, and void for the residue. And the Statute it self speaks of usual Rent; all which proves, That use ought to guide the conveniencie. 2d Point, That the grant to an Infant was good, because it is granted to be executed by his Deputy. I grant, that an Infant cannot be an Attorney, because an Attorney cannot make a Deputy. And this Grant is not inconvenient *ex natura rei*, neither to the Grantor, nor to the Grantee. 1. It is not inconvenient *ex natura rei*, for such an Office is grantable to one and his heirs, which by possibility may descend to an Infant, and there he shall execute it by Deputy; and the same inconvenience is in this Case, if there be any. And if the execution of an Office may be by Deputy where-

where the party is not able, the ſame reaſon is in this Caſe. 2. It is not inconvenient to the Grantor, becauſe as it is preſumed, when a man grants an Office to one and his heirs, that he ſees that the ſame by poſſibility may deſcend to an Infant; ſo he ſays in our Caſe, at the time of the grant, he is an Infant. 3. It is not inconvenient to the Grantee, for it is for his benefit. 27 *H.*8.28.8 *E.*4.7. But here it may be objected, That this Office doth concern the Commonwealth, and if the Infant commit any offence he ſhall not be puniſhed, becauſe it ſhould be inconvenient: To that I anſwer, that the Infant ought to execute it by his ſufficient Deputy; and he himſelf ſhall be charged for any eſcape, and by forfeiture of his Office, as any other may. Beſides, you ſhall never prejudice any in *præſenti*, for the future prejudice which by poſſibility may happen to the Commonwealth, 10 *E.* 6.14. *Stone* and *Knight's Caſe*. *Hill.* 3 *Car. Rot.* 119. An Infant was bound by arbitrament. *Trin.* 3 *Car. Rot.* 119. An Infant was bound for his ſchooling. But it may be farther objected, That it concerns the adminiſtration of Juſtice, which an Infant cannot do. To which I anſwer, that he may make a Deputy, who ought to be adjudged ſufficient by the Ordinary, and he may well execute it. 26 *H.*6. *Grants* 12. An Infant elected Parſon to ſerve a Cure who ſhall be examined by the Ordinary, 21 *E.*4.13. An Infant may be Mayor, 18 *E.*3.33. 26 *E.*3.63. An Infant who comes in by purchaſe, makes him more liable than he who comes in by deſcent. But in our Caſe, the grant *à fortiori* ſhall be good, becauſe it is executory. And he took the difference between an Executory grant as here, which by poſſibility may be made good, (as in our Caſe it was, becauſe that the Grantee was of full age before the Office fell in poſſeſſion) and where an intereſt veſts immediately: Farther, he conceived the Caſe the ſtronger, becauſe the Deputy came in by the allowance of the Ordinary. *Ward* for the Defendant. There are four Queſtions. 1. Whether a grant to an Infant in poſſeſſion be good. I conceive not; 1. *quoad naturam rei*, it is not good, becauſe that by that Grant the Commonwealth is prejudiced. 2. The Office doth concern the adminiſtration of Juſtice; and there-

for-

fore cannot be granted in Fee, and by conſequence there ſhall be no deſcent of ſuch Judicial Office, as hath been objected by Mr. *Maynard*, 1 *Rep.* I agree, that the Grant of a Parkerſhip to an Infant is good: and where it was objected, that it may be prejudicial by poſſibility, I conceive it *apparens nocumentum*; as 5 *Rep.* 101. and therefore the like Nuſance, as the caſe is there put, may be deſtroyed. 9 E. 4, 5. *Winters Caſe*, Clerk of the Crown. 12 & 13 *Eliz. Dyer* 293. 9 *Rep.* 96. *Mich.* 40, 41 *Eliz. Scamblers* caſe; It was adjudged, That an Infant is not capable of a Stewardſhip of a Mannor; and the reaſon is, becauſe that thereby the Tenants may be prejudiced; ſo in our Caſe the Commonwealth. *Trin.* 13 *Car. Rot.* 493. our very caſe in the Common Pleas, was adjudged. Further, an Infant is not capable of this Office, becauſe *Miſfeaſans & Nonfeaſans* may be, and he ſhall not be puniſhed for it; for an Infant at the Common Law, is not liable to an Action of Waſt, or an Action upon the caſe. 8 *Rep.* 95. *Doct. & Stud.* The 2. Queſtion, Whether the Grant to him and his Deputy, make the Grant good: I hold it doth not. 7 *Eliz. Dyer* 238. b. 9 *Rep.* 38. 10 E. 4. 1. 39 H. 6. 54. The Officer is chargeable for his Deputy, and not the Deputy himſelf: And if it be ſo, if this Grant ſhould be good, here ſhould be a Miſdemeanor in the Office, and none ſhould be puniſhed for it; which ſhould be inconvenient: for the Deputy cannot be charged, nor the Officer in our Caſe, becauſe he is an Infant, and therefore the Grant is not good. The 3. Queſt. Whether this ſubſequent Act of the Infant coming of full age, before the falling of the Office into poſſeſſion, hath made the Grant good. I hold, that not, upon the common Rule, *Quod initio non valet*, &c. So is the Biſhop of *Saliſburies Caſe*, Sir *George Reignalls Caſe*, and 27 H. 6. 10. The 4. Queſtion, Whether this Grant in Reverſion to a man of full age, be good at the Common Law? and I hold it is not; becauſe it is a judicial Office, which is not grantable in Reverſion: with which agrees 11 *Rep.* Auditor *Curles Caſe*. The 5 Queſtion, Whether it be within the Statute of 1 *Eliz.* And I hold it is not, becauſe that muſt take effect from the time of the grant-

ing of it, as the Statute ſpeaks. 6. I conceive it is not a neceſſary Grant, becauſe it is not within the exception of the Statute, *Et exceptio firmat Regulam.* It was objected, That Uſage makes theſe Grants good. I conceive the contrary, That Uſage is not a Rule to meaſure a thing, whether it be convenient or not. And a grant may be good, which is not uſed. And the Courts of Juſtice ought to judge what is convenient or neceſſary, and what not. So in *Litt.* and the Commentaries, *Say* and *Smiths* caſe. Beſides, it is not Neceſſary, for he ſtands but for a Cypher, and doth nothing, and therefore not Neceſſary. Beſides, it is inconvenient, and takes from the Succeſſor *honorem munificentiæ*, for by the ſame reaſon that he may grant one, he may grant all the Offices in Reverſion, ſo as his Succeſſors ſhall not have one to grant; and by this means ſhall take away a flower of the Biſhoprick. 10. *Rep.* 61. a. The Opinion of *Popham* Chief Juſtice: An Office is not Grantable in Reverſion by the Biſhop. But the Court was clear of Opinion, without Argument for the Plaintiff, That the Grant is good. *Crooke* he denied that ſuch an Office is not grantable in Fee, and inſtanced in the Ushers Office and Chamberlains of the Exchequer, which are Judicial Offices, and yet granted in Fee: And it was denied that this is an Office of Judicature, but Miniſterial only. To that which was objected, That the Action doth not lie againſt an Infant; It was anſwered, That an Action upon the caſe doth lie againſt an Infant Executor; an Action upon the Caſe will lie againſt an Infant for a Nuſance, or for words, by the common Law. And in our Caſe he ſhall forfeit his Office. An Infant may be Executor, in which greater confidence and truſt is repoſed; and in our Caſe the Grant to an Infant is not void *ab initio*, but voidable only upon *contingent*; And I conceive, that if the uſage will warrant it, That he may grant all the Offices in Reverſion: and upon that difference depends the Opinion of *Popham*, in the 10 *Rep.* for there it doth not appear, that the Cuſtom was to grant in Reverſion: And therefore it was not good. *Barckley:* The King may grant in Reverſion without any Cuſtom. 9 *Eliz. Savages Caſe.* And there

there is no queſtion, but that Cuſtom may make an Office grantable in Reverſion, in the caſe of a common perſon. 1 *H.* 7. *Crofts* caſe. Alſo the caſe of the Uſher of the Exchequer granted in Fee. And there is no queſtion, but a Judicial Office may be granted to one and his Heirs. And the Office of Warden of the Fleet, which is an Office of great truſt, is granted in Fee. And as ſuch Offices may deſcend to an Infant; ſo a Feme covert may have ſuch an Office, for ſhe may have a huſband who may execute it; and ſo an Infant may have a deputy. 7 *H.* 6. There is a difference amongſt Infants; an Infant, before the Statute of 10 *Eliz.* might have been Preſented to a Benefice, and he was Parſon *de facto*. So a meer Lay-man: but the ſame ought to be underſtood of an Infant who was of age of diſcretion. A Prebendary was granted to *Prideaux*, at the age of 3 years, and was adjudged void, becauſe he was not of age of diſcretion; but if he had been, it had been good. And I conceive, that it is neceſſary and convenient that it ſhould be granted in Reverſion, for by that means the Office would never be vacant, and ſhould be always provided of thoſe who were ſufficient to execute it. So in our Caſe the Infant may be inſtructed before he come of full age. And farther, as an Infant when he is Preſented, is to be allowed or diſallowed by the Ordinary; ſo the Deputy is by the Court. The Statute of 1 *El.* makes againſt you; for although it be not within it, yet it may be good at the common Law, like the concurrent Leaſe, which is good at the common Law, and not within the Statute of 1 *Eliz.* The reſt of the Juſtices did all agree with *Barckley*. And Juſtice *Jones* ſaid, that *Seambler's* Caſe, cited by my Lord *Coke* in *Inſtitutes* 3. b. was adjudged contrary, That an Infant was capable of a Stewardſhip in Reverſion; and he ſaid that it was adjudged in the Exchequer, that an Ignorant man was capable of an Office in Reverſion; which doth not differ from our Caſe.

Sir John Saint-Johns *Caſe*.

69. THe Lady *Cromwell* was poſſeſſed of divers Leaſes, and conveyed them in truſt, and afterwards married with the ſaid Sir *John Saint-John*; and afterwards ſhe received the mony which came of the truſt, and with part of it ſhe bought Jewels, and part ſhe left in Mony, and died. And Sir *John Saint-John* took Letters of Adminiſtration of the goods of the Wife: And the Eccleſiaſtical Court would make him accomptable for the Jewels, and for the Mony; and to put them into an Inventory. And the Opinion of the Court was, That he ſhould not put them into the Inventory, becauſe the property is abſolutely in the husband, & he hath them not as Adminiſtrator; but things in action he ſhall have as Adminiſtrator, and ſhall be accomptable for them: and in that caſe a Prohibition was granted as to the Mony. It was moved again this Term, That the Lady *Saint-John* did receive part of the Mony, put it out, and took Bonds for it in the names of others, to her uſe; and the Spiritual Court would have him accompt for that, and thereupon a Prohibition was prayed; but the Court would not grant it. And there *Barckley* differed in Opinion, and ſo did the Court, ſome being for it, and ſome againſt it. The reaſon given wherefore the Prohibition ſhould not be granted, was, becauſe the Mony received upon the truſt, is in Law, the Monies of the Truſtees, and the wife hath no remedy for it, but in Court of Equity; and therefore that the husband ſhould have it as Adminiſtrator. The reaſon urged wherefore the Prohibition ſhould be granted, was, becauſe here the truſt was executed, when the wife had received the Mony, and by the Receipt the husband had gained property therein as husband, and therefore ſhould not be accomptable for it. Farther, here the Eccleſiaſtical Court ſhould determine the truſt, of which they have no Juriſdiction, for they have not a Court of Equity. And the Court ruled, That the Counſel ſhould move in Chancery for a Prohibition, for in Equity the mony did belong to the wife. And here it was agreed,

agreed, That if the Truſtees conſent that the wife ſhall receive the mony, as in our Caſe the contrary doth not appear, that there the husband might gain a property as husband; but becauſe the Court conceived, that the Eccleſiaſtical Court had not Juriſdiction, a Prohibition was granted. And here it was agreed, That if a woman do convey a Leaſe in truſt, for her uſe, and afterwards marrieth, that in ſuch caſe, it lies not in the power of the husband to diſpoſe of it; and if the wife die, the husband ſhall not have it, but the Executor of the wife; and ſo it was ſaid, it was reſolved in Chancery.

Hob. 8 in M.

1. Inſt. 351. a. acc.

70. *Barckley* and *Crooke*, there being no other Juſtice at that time in Court, ſaid, That upon a Petition to the Archbiſhop, or any other Eccleſiaſtical Court, no Prohibition lieth: But there ought to be a Suit in the Eccleſiaſtical court. And by them, a Libel may be in the Eccleſiaſtical court, for not repairing a way that leadeth to Church, but not for repairing of a high-way: and upon ſuggeſtion that the Libel was for repairing a high-way, a Prohibition was granted.

71. Many Indictments were exhibited ſeverally, againſt ſeveral men, becauſe each by himſelf, ſuffered his door to be unrepaired, and it was ſhewed in the Indictments, that every one of them ought to repair: And thereupon it was moved, that they might be quaſhed; but the Court would not quaſh them without certificate, that the parties had repaired their doors; but it was granted, that Proceſs ſhould be ſtayed, upon motion of Counſel that reparation ſhould be immediately done. But at the ſame time, many Indictments, for not repairing of the high-way, which the Pariſhioners ought to have repaired, according as it was found by Verdict, the ſame Term were quaſhed for the ſame defect: But in truth, there was another fault in the Indictment, for that it was joynt one only, whereas there ought to have been ſeveral Indictments; but they were quaſhed for the firſt defect.

72. A.

72. A Replevin was brought in an Inferiour Court, and no Pledges *de returno habendo*, were taken by the Sheriff, according to the Statute of *Weſt.* 2. c. 2. After the Plaint was removed into this Court by a *Recordari*, and after Verdict given, it was moved in arreſt of Judgment, want of Pledges; for theſe reaſons, becauſe the Pledges *de returno habendo*, are given by that Statute, as 2 *H.* 6. 15. and 9 *H.* 6. 42. b. And that Statute ſaith, That Pledges ſhall be taken by the Sheriff, and therefore no other can take them, notwithſtanding that Pledges might be found here in Court. And 3 *H.* 6. 3. and *F. N. B.* 72. a. ſay, That where Pledges are found, that they ſhall remain, notwithſtanding the removal of the Plaint by *Recordari*: and the reaſon is, becauſe the Sheriff is a ſpecial Officer, choſen to that purpoſe by the Statute, and therefore no other can take them. Beſides, there would be a failer of Juſtice, if the Court ſhould put in Pledges, for then there might be no remedy againſt the Sheriff, for that he found no Pledges, and no remedy againſt the Pledges, becauſe they are not found according to the Statute, and ſo a failer of Juſtice; and by that means the Sheriff ſhould fruſtrate and avoid the Statute; for no Pledges ſhould ever be found, and ſo he ſhould take advantage of his own laches and wrong. Farther, it was objected, that theſe proceedings are the judicial act of the Court, and therefore the Court will not alter or diminiſh them. *L. Entries* 1. and 3 *H.* 6. And farther, it was ſaid, That the caſes of *Young* and *Young*, and Dr. *Huſſies* caſe, adjudged in this Court, That Pledges may be found at any time before Judgment were, in Action upon the Caſe, and not in *Replevine*, as our caſe is, for which there is ſpecial Proviſion made by the Statute. But it was anſwered, and agreed by the whole Court, that Pledges may be found by this Court: for the Pledges given by the *Statute* of *Weſt.* 2. are only to give remedy againſt the Sheriff; and if the Sheriff do not his duty, but ſurceaſeth, we may as at the Common Law put in Pledges, and yet notwithſtanding remedy may be againſt the Sheriff upon the *Statute* for his neglect. And farther it was agreed, That Pledges may be found at any time before Judgment,

Judgment, as in *Young* and *Youngs Caſe*, and Dr. *Huſſies Caſe* it was adjudged: And Judgment was affirmed.

73. There can be no ſecond Execution granted out, before that the firſt be returned.

74. Two Joyntenants of a Rectory agree with ſome of their Pariſhioners, that they ſhall pay ſo much for Tithes: and notwithſtanding, one of them ſueth for Tithes in the Eccleſiaſtical court; and a Prohibition was prayed, becauſe that one of them cannot ſue without the other; and the Court would not grant it: and their reaſon was, becauſe although that one of them cannot ſue without the other by our Law; yet perhaps, the ſpiritual Court will permit it.

75. Husband and Wife brought a Writ of conſpiracie, and it was adjudged that it would not lie. And *Jones* cited this caſe, That Husband and Wife brought an Action upon the Caſe againſt another for words, *viz.* That the Husband and Wife had bewitched another; and it was not good, becauſe that the wife cannot joyn for Conſpiracie made againſt the husband, nor for treſpaſs of Battery, as the Book is, 9 *E.* 4. But Juſtice *Crook* was of Opinion, That the Conſpiracie would well lie, becauſe that the Indictment was matter of Record, and therefore not meerly Perſonal: but the whole Court was againſt him: and Juſtice *Bareckley* took the difference, where they ſue for Perſonal wrong done to them, there they ſhall not joyn; but where they have a joynt Intereſt, as in caſe of a *Quare impedit*, there they ſhall joyn.

Thurſton *againſt* Ummons *in Error to Reverſe a Judgment in* Briſtow.

76. THurſton brought an Action upon the Caſe againſt *Ummons*, & declared, That the Defendant brought an Action againſt him, at the Suit of *Hull*, & without his privity: And there-

thereupon did arreſt and impriſon the Plaintiff, by reaſon whereof all his Creditors came upon him, and thereby that he had loſt his Credit, &c. And a Verdict was found for the Plaintiff, and thereupon Error brought; and two Errors were alledged. 1. That the Action will not lie, becauſe in truth there was a juſt Debt due to *Hull*, in whoſe name he ſued. 2. Becauſe it is not ſhewed, that the cauſes of Actions, which the other Creditors had againſt him, did ariſe within the Juriſdiction of the Court of *Briſtow*. And notwithſtanding the firſt Error alledged, Judgment was affirmed by the whole Court upon this difference; where *Hull* himſelf ſueth or commenceth Suit againſt the Plaintiff, there although by that Suit he draw all the Creditors upon the back of him, and ſo perhaps undo him, yet becauſe it was a lawful act, no Action upon the Caſe lieth againſt him: But where one commenceth Suit againſt another, in the name of another, and without his privity, that is Maintenance, which is a tortious Act, and therefore an Action will lie: ſo in the principal caſe. As to the ſecond Error alledged, the Court differed in Opinion. *Barkley*: That the damages were ill aſſeſſed, becauſe they were given aſwel for the Actions brought by the other Creditors. But Juſtice *Bramſton contrà*, That the damages were well aſſeſſed, becauſe that the Actions brought by the Creditors were added for aggravation only, and the cauſe of the Action was the Arreſt and Impriſonment, like the caſe where a man ſpeaks words which are in part actionable, and others only put in for aggravation, and damages is aſſeſſed for the whole, it is good. There was a third Error aſſigned, That the *Venire facias* was, *de Warda omnium Sanctorum de Briſtow*, without ſhewing in what Pariſh.

Childe *againſt* Greenhil.

77. CHilde brought Treſpaſs againſt *Greenhill* for Fiſhing *in ſeperali piſcaria* of the Plaintiff, and declared that the Defendant *piſces ipſius cepit*, &c. And Verdict found for the Plaintiff. And it was moved by *Saint-John* in Arreſt of Judge-

Judgement, becauſe the Plaintiff declared of taking of *piſces ſuos*, whereas the Plaintiff, they being *feræ naturæ*, hath not property in them. *Regiſter* 94, 95. and *F. N. B.* and *Book Entries*. 666. No count, that the Defendant *cepit piſces ipſius*, but *ad valentiam*, &c. without *ipſius*. So *Fines Caſe* in *Dyer*. 7 *H*. 6. 36. 10 *H*. 7. 6. 12 *H*. 8. 10. by *Brudnell*. 13 *E*. 4. 24. 7 *Rep*. caſe of *Swannes*. And the Book of 22 *H*. 6. 59. is overruled by the caſe of *Swannes*. 34 *H*. 6. 24. And the ſame is matter of ſubſtance, and therefore not helped after Verdict. An Action of Trover and Converſion againſt husband and wife *quia converterunt*, is not good, and it is not helped after Verdict, becauſe it is matter of ſubſtance. *Rolls* for the Defendant; I agree, that *lepores ſuos*, or *piſces ſuos*, without any more, is not good. But where he brings an Action of Treſpaſs for taking them in his Soil, there it is good, becauſe it is within his Soil. So in our caſe, for taking *piſces ſuos* in his ſeveral Piſcary: and with this difference agree 22 *H*. 6. 59. 43 *E*. 3. 24. ſo *Regiſt*. 93, & 102. 23 *H*. 6. *tit*. *Treſp*. 59. & 14 *H*. 8. 1. and the Book of 43 *E*. 3. ſaith, That in Treſpaſs, the Writ ſhall not ſay, *Damam ſuam*, if he do not ſay, that it was taken in his Park or Warren, or ſaith *damam domitam*, or as the Book is in 22 *H*. 6. in my Soil or Land; and by *Newton*, he ſhall ſay there *damas ſuas*. And admit that it was not good, yet I hold, that it is helped after Verdict, becauſe it is not matter of Subſtance; for whether they be *piſces ſuos* or not, the Plaintiff ſhall recover damages. Juſtice *Barckly*: It is true, that in a general ſenſe they cannot be ſaid *piſces ipſius*, but in a particular ſenſe they may; and a man may have a ſpecial or qualified property in things which are *feræ naturæ*, three ways; *ratione infirmitatis*, *ratione loci*, & *ratione privilegii*: and in our caſe the Plaintiff hath them by reaſon of Priviledge. And it was agreed by the whole Court, That Judgment ſhould be affirmed, upon the very difference taken by *Rolls*, that where a man brings Treſpaſs for taking *piſces ſuos*, or *lepores ſuos*, &c. and the like, that the Action will not lie. But if he bring Treſpaſs for fiſhing in his ſeveral Piſcary, as in our Caſe, or for breaking of his Cloſe, and taking *lepores ſuos*, &c. there it will lie.

Pitfield *againſt* Pearce.

78. IN an *Ejectione firme*, the Caſe was thus. *Thomas Pearce* the Father, was ſeiſed of Lands in Fee, and by Deed, in conſideration of Marriage, did give and grant this Land to *John Pearce*, the now Defendant, his ſecond Son, and to his Heirs after his death, and no Livery was made: *Thomas Pearce* died, the Eldeſt Son entred, and made a Leaſe to the Plaintiff, who entred, and upon Ejectment by the Defendant, brought an *Ejectione firme*. *Twiſden*: The only queſtion is, whether any eſtate paſſeth to the Son by the Deed; and it was ſaid, there did, and that by way of Covenant. And it was agreed, That in this Caſe if Livery had been made it had been void, becauſe that a Freehold cannot begin at a day to come. But I may Covenant to ſtand ſeiſed to the uſe of my Son after my death. So a man may ſurrender a Copyhold, to take effect after a day to come. *Com.* 301. So a man may bargain and ſell at a day to come. 1 *Mar. Dyer.* 96. *Chudleighs Caſe.* 129. 20 *H.* 6. 10. A uſe is but a truſt betwixt the parties, and 7 *Rep.* 400. There need not expreſs words of Covenant, to ſtand ſeiſed to an uſe. 25 *Eliz. Blithman* and *Blithmans* caſe, 8 *Rep.* 94. Beſides, theſe words *dedi & conceſſi*, are general words, and therefore may comprehend Covenant: and words ſhall be conſtrued, that the Deed may ſtand, if it may be. 8 *Aſſ.* 34. 7 *E.* 3. 9. But I agree, that if the intent appeareth that it ſhall paſs by tranſmutation of poſſeſſion, that there it ſhall be ſo taken; but here his intent doth not appear to be ſo, for if there ſhould be Livery, then the ſon ſhould take nothing, for the reaſon before given, which is againſt his meaning. *Mich.* 21 *Jac. Rot.* 2220. *Buckler* and *Simons Caſe. Dyer* 202. *Vinions* caſe. The caſes cited before, are in the future tenſe, but the words are here, *I give, &c.* 36 *Eliz. Callard* and *Callards Caſe*, Stand forth *Euſtace*, reſerving an eſtate to my ſelf and my wife, I do give thee my Land: and the better Opinion was, That in that caſe it did amount to a Livery, being upon the Land, for his intent is apparent. *Mich.*

41 &

41 & 42 *Eliz. Trelfe* and *Popwells Caſe*, adjudged in ſuch caſe, That an uſe ſhall be raiſed: For which it was concluded, that in this caſe there is a good eſtate raiſed to *John Pearce* by way of Covenant. *Rolls*: I conceive, that no eſtate is raiſed to *John Pearce* by this conveyance. It was objected, That it ſhall inure by way of Covenant, to raiſe an uſe. I agree, that if the meaning of the party may appear that he intended to paſs his eſtate by way of raiſing of an uſe, otherwiſe not. And here is no ſuch appearance. *Foxes Caſe* in 8 *Rep.* is a ſtronger caſe; and here it doth not appear that he meant to paſs it by way of uſe. But by the word [*give*] he intended tranſmutation of poſſeſſion. 8 *Rep. Bedells* caſe, *Mich.* 18. *Car. Rot.* 2220. in the Common Pleas it was adjudged, That a gift of a Remainder after the death of the grantor was void; wherefore he concluded for the Plaintiff, and ſo Judgment was given by the whole Court. And Juſtice *Jones* ſaid, When a man makes a doubtful Conveyance, it ſhall be intended a Conveyance at the Common Law. And it ſhall not be intended that the Father would make him Tenant for life only puniſhable of waſt.

Mich. 15° Car' *in the Kings Bench.*

79. IT was moved for a Prohibition to the Counſel of the Marches, and the Caſe was ſuch: A man ſeiſed of Lands in Fee, made a Feoffment to the uſe of himſelf for life, the remainder in tail to *J.S.* He in the remainder Levied a Fine. And the Counſel of the Marches, upon a ſurmiſe, That the Tenant for life died ſeiſed, according to their Inſtructions, would ſettle the poſſeſſion upon the heir of Tenant for life, againſt the Conuſee. For their Inſtructions were made, That where a man had the poſſeſſion by the ſpace of three years, that the ſame ſhould be ſettled upon him, until trial at Law were had. But the whole Court was againſt it, becauſe it doth appear that he had but an eſtate for life, and ſo the poſſeſſion apper-

tained to him in the remainder. And here it was ſaid by Juſtice *Barckley*, that their Opinion hath been, That the poſſeſſion of Tenant for life ſhould be the poſſeſſion of him in the Remainder, as to this purpoſe. Note that the Principal caſe here was (although the Caſe before put was alſo agreed for Law) thus: Tenant in Tail levied a Fine, to the uſe of himſelf for Life, the remainder in Fee to *J. S.* and died: In that Caſe the Council in the Marches would ſettle the poſſeſſion upon the heir of Tenant in tail, againſt the Purchaſer, who held in by the Fine which had bar'd the eſtate tail, by which the Iſſue claimed; and the whole Court was againſt it, for which cauſe a Prohibition was granted.

80. *Habeas corpora* was directed to the Porter of *Ludlow*, to bring the bodies of *John Shielde* and *William Shielde* into the Kings Bench; the caſe ſhortly (as appears upon the retorn) was this. *Powell* the Father brought a Bill, in the nature of an Information, againſt the ſaid *John* and *William Shield*, before the Council of the Marches in *Wales*, for an unlawful Practice, Combination, and Procurement of a clandeſtine Marriage in the night, betwixt *Mary Shield* a Maid-ſervant, and the Son of *Powell*, who was a Gentleman of good credit and worth, the Parſon alſo being Drunk, as he himſelf ſware, and the ſame alſo being without Banes or Licence; for which offence they were ſeverally Fined to the King, and an hundred Marks damages given to the Plaintiff, and farther ordered by the Council, that they ſhould be impriſoned till they paid their ſeveral fines to the King, and damages to the Party, and found Sureties to be bound in Recogniſance for their good behaviour, for one year, and till they knew the farther Order of the Council: and theſe were the cauſes which were retorned. And upon this retorn, *Glynn*, who was of Counſel with the Priſoners, moved many things, and many of them, as was conceived by the Court, altogether impertinent. But the Objections which were pertinent were theſe. Firſt, That the Councel of the Marches, as this caſe is, have

have no Juriſdiction, becauſe the clandeſtine Marriage is a thing meerly Spiritual, and therefore not within their Inſtructions. The ſecond was, That they have exceeded their Inſtructions, in that they have given damages to the party above fifty pounds. For by their Inſtructions, they ought not to hold Plea where the Principal or Damages exceed fifty pounds. But as to the firſt, he ſaid, there may be this Objection, That they did not puniſh them for the clandeſtine Marriage, which in truth is a thing meerly Spiritual, but for the unlawful Practiſe and Combination, and for the execution of it: To which he anſwered, That they have not Juriſdiction of the Principal, and therefore not of the Acceſſory: (here note that it was afterwards ſaid by *Bramſton* Chief Juſtice, That the unlawful Practiſe and Combination was the Principal, and the clandeſtine Marriage but the Acceſſory; which was not contradicted by any.) Farther, it was objected by *Glynn*, That they were Impriſoned for the damages of the Plaintiff, and it doth not appear, whether it was at the Prayer of the Party, as he ought by the Law. *Bankes*, the Kings Atturny-General, contrary. And as to the firſt, Their Inſtructions give them power to hold Plea of unlawful Practiſes and Aſſemblies: And this is an unlawful Practiſe and Aſſembly, and therefore within their Inſtructions: And although that Hereſie, and clandeſtine Marriage, and ſuch offences, *per ſe* are not within their Inſtructions, yet being clad with ſuch unlawful circumſtances and practiſes, they are puniſhable by them. As to the ſecond he ſaid, The Inſtruction which reſtraineth them that they do not hold Plea above fifty pounds, is only in civil Actions, at the ſeveral ſuit of the party: But there is another Inſtruction, which gives them power, where the cauſe is criminal, to aſſeſs damages according to the quality of the Offence, and at their diſcretions. As to the third Objection, he ſaid, That the Retorn, being that they were in execution for the damages, it ought to be meant at the Prayer of the Party, otherwiſe it could not be. For which cauſes he prayed that the Priſoners might be remanded. And the whole Court (*Crooke* being abſent) were clear upon this Retorn, That they ſhould

ſhould be remanded; becauſe it appeareth that their Fines to the King were not payed: And therefore, although that the other matters had been adjudged for them, yet they ought to be remanded for that one. And as to the Objections which were made, the Court agreed with Mr. Attorney, except in the point of Damages, and for the ſame reaſons given by him. But as to the point of the Damages, whether they have gone beyond their Inſtructions, and ſo exceeded their power in giving above fifty pounds damages or not; It ſeemed to the Court they had; and as it ſeemed to them, if the Return had been, That the Kings Fines were paid, it would have been hard to maintain that the aſſeſſing above fifty pounds damages, was not out of their Inſtructions: but becauſe the Kings Fines were not paid, they were Remanded, without reſpect had thereunto; for the reaſons given before.

81. It was ſaid by the Court, That when Judgment is given in this Court againſt another, and Execution upon it, and the Sheriff levieth the mony; the Lord Keeper cannot order that the mony ſhall ſtay in the Sheriffs hands, or order that the Plaintiff ſhall not call for it: for notwithſtanding ſuch Order he may call for it. And it was farther ſaid by the Court, That an Attachment ſhall not be granted againſt the High Sheriff for the contempt of his Bayliffs. And a Writ of Error is a *Superſedeas* to an Execution; but then there ought to be notice given to the Sheriff: otherwiſe, if he notwithſtanding ſerve the Execution, he ſhall not run in contempt, for which an Attachment ſhall be granted.

82. *Serjeant Callis* came into Court, and moved this caſe: *Chapman* againſt *Chapman*, in Treſpaſs done in Lands within the Dutchy of *Cornwal*, which were Borough-Engliſh, where the cuſtome was, that if there were an eſtate in Fee in thoſe Lands, that they ſhould go to the younger Son, according tthe cuſtome; but if in Tail, th e ſhould deſcend to the Heir

Heir at Common Law: And it was moved by him, that the cuſtom was not good, becauſe it cannot be at one time cuſtomary, and go according to the cuſtom, and at another guildable. And the whole Court (*Crooke* only being abſent) were againſt him, that the cuſtom was good.

Hicks *againſt* Webbe.

83. IN Treſpaſs for a way, the Defendant did juſtifie, and ſaid, that he had a way not only *ire, equitare & averia ſua fugare*; but alſo *carrucis & carrer agiis carriare*. The Plaintiff traverſed it *abſque hoc*, that he had a way not only *ire, equitare, &c.* in the words aforeſaid: and thereupon they were at iſſue, and found for the Plaintiff. *Glynn* moved in arreſt of Judgment, that the Iſſue was ill joyned, becauſe it was not a direct affirmative, but by inducement only. And the whole Court was againſt him. And Juſtice *Jones* ſaid, That if I ſay, that not only Mr. *Glynn* hath been at ſuch a place, but alſo Mr. *Jones*, without doubt it is a good affirmative, that both have been there. But they all agreed, that the pleading was more elegant than formal.

84. In the Caſe betwixt *Brooke* and *Boothe*: Juſtice *Barckley* ſaid, that it is a Rule, That if there be two things alledged, and one of neceſſity ought to be alledged, and he relies on only upon the other, it is no double Plea: As if a man plead a Feoffment with Warranty, and relieth upon the Warranty, it is not double.

85. Juſtice *Barckley* ſaid, That the Court of the Exchequer, they may make a Leaſe for three Lives, by the Exchequer-Seal.

Clarke *againſt* Spurden.

86. IN a Writ of Error to reverſe a Judgment given in the Court of Common Pleas, the caſe was ſhortly thus:

thus: *A.* wife of *J.S.* inteſtate, promiſeth to *B.* to whom Adminiſtration was committed, that if he ſhall relinquiſh the Adminiſtration at the requeſt of *C.* and ſuffer *A.* to Adminiſter, that *A.* will diſcharge *B.* of two Bonds. In *Aſſumpſit* brought by *B.* in the common Pleas, he alledged that he did renounce Adminiſtration, and ſuffered *A.* to Adminiſter, and that *A.* had not diſcharged him of the two Bonds. And it was found for the Plaintiff. And thereupon Error was brought, becauſe *B.* doth not ſhew, that he did renounce the Adminiſtration at the requeſt of *C.* And *Rolls* for the Plaintiff, in the writ of Error, did aſſign the ſame for Error. Juſtice *Barckley* (all the other Juſtices being abſent) held that it was Error; for conſideration is a thing meritorious, and all ought to be performed, as well the requeſt on the part of *C.* as the permiſſion of the part of *B.* which ought to be ſhewed: For perhaps *B.* was compelled to relinquiſh it in the Eccleſiaſtical Court, as it might be; for of right the wife ought to Adminiſter. And therefore it ought to have been averred, that it was at the requeſt of *C.* And therefore, if it had been that he ſhould renounce at the charge of *C.* it ought to be averred, that it was at the charge of *C.* And it was adjourned.

87. A man Libelled in the Spiritual Court, for Tithes for barren cattle: and it was moved for a Prohibition upon this ſuggeſtion, *viz.* That he had not other cattle than thoſe which he bred for the Plough and Pale; and thereupon *Barckley* being alone there, granted a Prohibition. And the ſame Parſon alſo Libelled for Tithes of Conies; and for that alſo he granted a Prohibition, for they are not Titheable, if not by cuſtome: And here *Barckley* ſaid, That if Land be Titheable, and the Tenant doth not plough it, and manure it; yet the Parſon may ſue for Tithes in the Eccleſiaſtical Court.

North *againſt* Muſgrave.

88. IN Debt upon the Statute of 1 & 2 *Phil. & Mar. c.* 12. the words of which Statute are, *That no man ſhall take for*

for keeping in pound, impounding, or poundage of any manner of diſtreſs, above the ſum of four pence, upon pain of forfeiture of five pounds, to be paid to the party grieved. And the Plaintiff ſhewed that his Cattle were diſtreyned and impounded, and that the Defendant took of him ten pence for the poundage: And thereupon the Plaintiff brought an Action for the penalty of five pounds, and found for the Plaintiff. And the Judgment was, That he ſhould recover the five pounds, and damages, *ultra & præter* the mony taken for the poundage. And thereupon a Writ of Error was brought, and three things aſſigned for Error. Firſt, becauſe the Action was brought for the penalty of five pounds only, and not for the ſix pence which was taken above the allowance of the Statute, which ought not to be divided. Which was anſwered by Juſtice *Barckley* (all the other Juſtices being abſent) That notwithſtanding it is good; for true it is, that he cannot bring his Action for fifty ſhillings, part of the penalty, becauſe it is entire; but here are two ſeveral penalties, and he may divide and disjoyn them if he will, or he may wave the ſix pence. For *quilibet poteſt renunciare, juri pro ſe introducto.* The ſecond was, That he doth not demand that which is *ultra & præter* the four pence given by the Statute: and yet the Judgment is given for that, which is not good. To which Juſtice *Barckley* ſaid, That the Judgment was good. For no judgment is given for that which is *ultra & præter* the four pence, but only for the four pounds, becauſe he doth not demand it. And we cannot judge the Judgment to be erroneous by Implication. The third Objection was, That Coſts and Damages are given, which ought not to be upon a penal Law. For he ought not to have more than the Statute giveth; and therefore upon the Statute of *Perjury*, no Coſts are given: ſo upon the Statute of *Glouceſter* of Waſt, the Plaintiff ſhall recover no more than the treble value. But *Rolls* who was on the contrary, ſaid, That there are many preſidents in the common Pleas, that Damages have been given upon this Statute. But *Barckley* and *Jones*, who afterwards came, and ſeemed to agree with Juſtice *Barckley* in

the whole, was againſt it, That no Damages ought to be given; and deſired that the Preſidents might be viewed. But here *Rolls* offered this difference: Where the penalty given by the Statute is certain, as here, upon which he may bring Debt, there he ſhall recover Damages: but where the penalty is uncertain, as upon the Statute of *Glouceſter*, for treble damages, the Statute which giveth the treble value, and the like; there, becauſe it is incertain, he ſhall have no more. *Barckley* asked Mr. *Hoddeſdon*, If the Informer ſhould recover Damages. And he and *Keeling* Clerk of the Crown, anſwered, No; but ſaid Damages ſhould be given againſt him: and it was adjourned.

89. *Skinner* Libelled in the Eccleſiaſtical Court for the Tithes of Roots, of a Coppice rooted up. And *Porter* prayed a Prohibition. And it was ſaid by *Jones* and *Barckley* Juſtices, no other Juſtice being preſent, That if cauſe were not ſhewed before ſuch a day, that a Prohibition ſhould be awarded, becauſe it is *ad exheredationem*, and utter deſtruction of it. And the Opinion was, that the Branches ſhould be priviledged. And a man ſhall not pay Tithes of Quarries of Stone. And *Barckley* ſaid, It had been adjudged, That a man ſhall not pay Tithes for Brick and Clay.

F 90 *A.* ſaid to *B. Haſt thou been at* London *to change the Mony thou ſtoleſt from me?* And it was Objected, That theſe words are not actionable, becauſe they are an Interrogatory only, and no direct affirmative. But by *Barckley* and *Jones* (the other Juſtices being abſent) the words are actionable. For the firſt words, *Haſt thou been at* London, are the words of Interrogation; and the ſubſequent words, *viz. The mony thou ſtoleſt from me*, is a poſitive affirmation. And *Barckley* ſaid, That it had been oftentimes adjudged, That words of Interrogation ſhould be taken for direct affirmation. *Jones* alſo agreed to it; and he ſaid that this Caſe had been adjudged, That where a man ſaid to *J. S. I dreamed this night, that you ſtole an Horſe*, That the words are actionable. And

if

if theſe and the like words ſhould not be actionable, a man might be abuſive, and by ſuch ſubtile words always avoid an Action.

91. *A.* ſaid of *B.* that he took away money from him with a ſtrong hand, and alledged that he ſpoke thoſe words of him *innuendo felonicè*: and for them the Plaintiff brought an Action upon the Caſe. And by *Barckley* and *Jones* (none other being preſent) the Action doth not lie: for he may take money from him *manu forti*, and yet be but a Treſpaſſer; and therefore the *Innuendo* is void, for that will not make the words actionable, which are not actionable of themſelves.

92 Juſtice *Jones* ſaid, that it was a queſtion, Whether a Bar in one *Ejectione firme*, were a Bar in another. And Juſtice *Barckley* ſaid, that it is adjudged upon this difference, That a Bar in one *Ejectione firme*, is a Bar in another, for the ſame Ejectment; but not for another, and new Ejectment: to which *Jones* agreed.

Dickes *againſt* Fenne.

93. IN an Action upon the Caſe for words; the words were theſe: the Defendant having communication with ſome of the Cuſtomers of the Plaintiff, who was a Brewer, ſaid, That he would give a peck of Malt to his Mare, and ſhe ſhould piſs as good Beer as *Dickes* doth Brew. And that he laid *ad grave damnum &c.* *Porter* for the Defendant; that the words are not actionable of themſelves; and becauſe the Plaintiff hath alledged no ſpecial Damage, as loſs of his Cuſtome, &c. the Action will not lie. *Rolls*: that the words are actionable: and he ſaid, that it had been adjudged here, That if one ſay of a Brewer, *That he brews naughty Beer*, without more ſaying, theſe words are actionable, without any ſpecial damage alledged. But the whole Court was againſt him (*Crooke* only abſent) That the words of themſelves

ſelves, were not actionable, without alledging ſpecial damage; as the loſs of his Cuſtome, &c. which is not here. And therefore not actionable. And *Barckley* ſaid, That the words are only comparative, and altogether impoſſible alſo. And he ſaid, that it had been adjudged, that where one ſays of a Lawyer, *That he had as much Law as a Monkey*, that the words were not actionable; becauſe he hath as much Law, and more alſo. But if he had ſaid, *That he hath no more Law than a Monkey*, thoſe words were actionable. And it was adjorned.

Hodges *and* Simpſons *Caſe.*

94. A Man brought an Action of Trover and Converſion againſt husband and wife, of two Garbes, *Anglicè*, Sheaves of Corn; and ſaid that they did convert thoſe ſheaves *ad uſum ipſorum*, *viz.* of the Husband and Wife. And here were two things moved by *Hyde*. Firſt, that he ſhewed the Converſion to be of two Garbes, *Anglicè*, Sheaves of Corn: which plea is naught and incertain. And Courts ought to have certainty; but here it is not ſhewed, what Corn it was. And the *Anglicè* is void, and therefore no more than Trover and Converſion of ſo many Sheaves, which is altogether incertain; and therefore not good. The other thing is, That the Plaintiff ſayth, that the converſion was *ad uſum ipſorum*, which cannot be, for the wife hath no property during the life of the husband; and therefore cannot be *ad uſum ipſorum*. And he cited two Judgments in the point, where it was adjudged accordingly. And Juſtice *Barckley* ſaid, that it had been many times ſo adjudged. But Juſtice *Jones* ſaid, that there may be a Converſion by the wife to her uſe, as in this caſe to bake the Barley into bread, and to eat it her ſelf. And *Bramſton* Chief Juſtice ſaid, that a wife hath a capacity to take to her own uſe; for there ought of neceſſity to be property in the wife, before the husband can have by gift in Law: and they deſired to ſee Preſidents. And therefore it was adjourned, as to this point. But by the whole Court, the other was not good.

More

More of the Case of North *and* Musgrave.

95. MAynard for the Plaintiff, in the Writ of Error, That the Judgment was erroneous: First, because the damages and costs were given, where none ought to be given, being a penal Law: and therefore no more than the penalty shall be recovered. And he remembred the rule taken in *Pilfords* case. 10 *Rep.* 116. a. and he cited divers Presidents also for it. *Cokes* Book of *Entries* 31 & 41. And Presidents upon the Statute of *Perjury*. 38, 39. Secondly, because he divided the Penalty given by the Statute, which ought not to be, for by such means the offender should be doubly vext; for he might sue him after for the six pence *præter & ultra* that which was taken for the distress. And he said, it is like to the case of an Annuity, which is entire and cannot be divided. Thirdly, he said, That the Judgment it self was erroneous, because that Judgment is given for more than he demands. For the Judgment is, *quod recuperet* 5. *li. ultra & præter*, that which is above the 4 *d.* given by the Statute. *Rolls* contrary, that the Damages and Costs are well given; and the same is out of the rule of *Pilfords* case: because that the Action is no new action, but the thing is a new thing, for which the old Action is given: And the Damages and Costs are here given for the Suit and Delay, and not for the Offence. And he cited also Presidents for him, *viz.* The new Book of *Entries* 163, 164. For the second point, he said, That they are several penalties which are given, and therefore he might bring his Action severally for them, if he would. As to the third point, That Judgment is given for more than the party declares: it is not so, for then the Judgment shall be made vitious by Implication, which ought not to be. And as to dividing of the penalty and Judgment, the same was good by the whole Court, for the reasons before given. As to the giving of Costs, *Jones* and *Bramston* Chief Justice conceived, that they were well assessed, upon the presidents before cited: But *Barckley* doubted thereof, and did conceive that no

no coſts ſhould be given in this caſe, and that upon *Pilfords* caſe 10 *Rep.* As to the Preſidents, he ſaid, that they did not bind him; for perhaps, they paſſed *ſub ſilentio*. And afterwards it was adjorned.

Johnſon *againſt* Dyer.

96. IN an Action upon the Caſe for words, the Defendant having ſpeech with the Father of the Plaintiff, ſaid to him, *I will take my Oath that your Son ſtole my Hens.* For which words the Plaintiff brought the Action. But did not aver that he was his Son, or that he had but one Son. And it was holden by the whole Court (*Crooke* being abſent) that the plea was not good.

Leake *and* Dawes *Caſe.*

97. LEake brought a *Scire facias*, in the Chancery, againſt *Dawes*, to avoid a Statute; and the Caſe, as it was moved by Serjeant *Wilde*, was ſuch: *Hopton* acknowledged a Statute to *Dawes*, and afterwards conveyed part of the Land liable to the Statute to *J. S.* who conveyed the ſame to *Leake*, the plaintiff; and afterwards the Conuſor conveyed other part of the Land to *Dawes*, the Defendant, who was the Conuſee, by bargain and ſale: the Conuſee extended the Lands of *Leake*, the Purchaſer; who thereupon brought this *Scire facias*, to avoid the Statute, becauſe that the Conuſee had purchaſed parcel of the Land liable to the Statute, and ſo extinguiſhed his Statute. And this caſe came by *Mittimus* into the Kings Bench. And here it was moved by Serjeant *Wilde*, for *Dawes* the Defendant, in arreſt of Judgment. And taken by him for Exception, That the bargain and ſale is alledged to be made to *Dawes*, but it is not ſhewed, that it was by Deed inrolled; but yet it is pleaded, That *Virtute cujus*, *viz.* of Bargain and Sale, the Conuſee was ſeiſed, and doth not ſhew that he entred. And here it was ſaid by the Court, There

are

are two points. First, Whether an Inrolment ſhall be intended, without pleading of it? Secondly, Admitting not, what Eſtate the Bargainee hath, as this Caſe is? As to the firſt, Juſtice *Jones* took this difference. Where a man pleads a Bargain and ſale to a ſtranger, and where to himſelf. In the firſt caſe, he need not plead an Inrolment; but contrary in the latter. *Barckley* agreed it, and took another difference, betwixt a Plea in Bar, and a Count: In a Count, if a man plead a grant of a Reverſion without attornment, it is good; contrary in Bar: ſo in this Caſe. The ſecond queſtion is (admitting that the Deed ſhall be intended not to be inrolled without pleading) What eſtate *Dawes* the Conuſee hath before Entry, the Deed not being inrolled. For it was agreed by the whole Court, That if he be a diſſeiſor, or if he hath but an eſtate at will, that the Statute is ſuſpended. And firſt, whether he hath an eſtate at will, at the common Law, or not, without Entry. *Barckley*: that he had. But *Jones* and *Bramſton*, contrary; and it ſeemed that he had an eſtate at will, by the Statute. And put the caſe of feoffment in *Bucklers* caſe. 3. *Rep.* Where the Feoffee entreth before Livery, that he hath an eſtate at will: and *Barckley* agreed therein with him, for the poſſibility of inrolment. But *Jones* conceived that an eſtate at will, could not be executed by the Statute. And it was adjorned.

Curtiſſe *againſt* Aleway.

98. THe Caſe was thus: A woman was dowable of certain Land, within the Juriſdiction of the Council of the Marches, of which *J. S.* died ſeiſed. She accepted a Rent by parol of the Heir, out of the ſame Land, in ſatisfaction of her Dower. And afterwards there was a Compoſition betwixt them for defalcation of that Rent. Afterwards there was an Action brought before the Council of the Marches for the Arrerages of the Rent: where the queſtion was, Whether the Rent were in ſatisfaction of her Dower, or not: and it was moved by *Mortton* for a Prohibition. And it

it was granted by the Court; becauſe the ſame did concern Freehold, of which they have not Juriſdiction, for by the expreſs Proviſo of the Statute of 34 *H.* 8. of holding of plea of Lands, Tenements, Hereditaments, or Rents. But becauſe that it appeared by the Bill, that the woman was dead, ſo as the realty was turned into the perſonalty, *viz.* into Debt. And therefore it was conceived by *Evers* Attorney of the Marches, That although it was not within the Juriſdiction before, yet being now turned into a perſonal Action, that they have Juriſdiction. But *Jones* and *Barckley* Juſtices, were of a contrary Opinion; and *Jones* ſaid, That an Action of Debt for Arrerages would not lie before them, becauſe it touched the realty; which was denied by none but *Evers* Attorny.

Edwards *againſt* Omellhallum.

99. IN a Writ of Error, to reverſe a Judgment given in *Ireland*, in an *Ejectione firme*; the Caſe was this, as it was found by ſpecial verdict: A Mortgager made a Leaſe for years, by Deed indented, and afterwards performed the Condition, and made a Feoffment in Fee; the Leſſee entred upon the Feoffee, who re-entred; and the Leſſee brought an *Ejectione firme*. And the only queſtion, as it was moved by *Glynn*, was; Whether this Leaſe, which did inure by way of Eſtople, ſhould binde the Feoffee, or no: and by him it did, and *Rawlyns* caſe in the 4 *Rep.* 53. expreſly, and 1 & 2 *Phil. & Mar. Dyer* agreeth. And the whole Court (*Crooke* only abſent) without any argument, were clear, That it ſhould binde the Feoffee: for all who claim under the Eſtople, ſhall be bound thereby; *vid. Edriches* caſe 13 *H.* 7.

100 Serjeant *Fermayn* came into the Court, and ſhewed cauſe why a Prohibition ſhould not be granted in the caſe of *Skinner* before; who Libelled for Tythes of Coppice rooted up. He agreed that for timber-trees, above the growth of twenty, no Tithes ſhould be paid; and ſo he ſaid was the common Law,

Law, before the Statute of 45 E. 3. which was but a confirmation of the Common Law. And he ſaid, That as the body of the tree is priviledged, ſo are the branches and root alſo; which is a proof, that where the body is not priviledged, there neither ſhall be the root or branches. And in our Caſe he Libels for roots of underwoods, and the underwood it ſelf being titheable, therefore the roots ſhall be alſo tithable. And he ſaid, that the roots are not parcel of the Land. But Juſtice *Barckley* was againſt it; for they are not *creſcentia*, nor *renovantia*, as Tithes ought to be; and therefore no Tithes ought to be paid for them: and he ſaid, that a Prohibition hath many times been granted in the like caſes. But Dr. *Skinner* did alledge a cuſtome for the payment of Tithes of them. And upon that they were to go to trial: And here it was ſaid, that Dr. *Skinner* had uſed to have ſome ſpecial particular benefit of the Pariſhioners, in lieu of Tithe of Roots. And thereupon *Barckley* ſaid, That it is a Rule, where the Pariſhioner doth any thing which he is not compellable by the Law to do, which cometh to the benefit of the Parſon; there if he demand Tithes of the thing, in lieu whereof this is done, that a Prohibition ſhall be granted. And there is another rule: That Cuſtom may make that titheable, which of it ſelf is not titheable. And here he ſaid to Dr. *Skinner* being then in Court, That he had two matters to help him, and if any of them be found for him, that a Prohibition ought not to be awarded.

101. Juſtice *Barckley* ſaid, That if a man be living at the day of *Niſi prius*, and dieth before the day in Banck, the Writ ſhall not abate. So if a man be living the firſt day of the Parliament, and dieth before the laſt day, yet he may be Attainted: and the reaſon is, becauſe in the eye and judgment of Law, they are but one day by relation, which the Law makes.

102. There were three Brothers, the Eldeſt took Adminiſtration of the goods of the Father, and after Debts and

Legacies paid, the younger Brothers ſued the eldeſt in the Eccleſiaſtical Court, to compel him to diſtribute the Eſtate. And thereupon a Prohibition was prayed, and denied by the Court: for they having Juriſdiction of the Principal, may have Juriſdiction of the Acceſſary.

103. *A.* Libelled againſt *B.* in the Spiritual Court, for theſe words: *Thou art a Drunkard, and uſeſt to be Drunk thrice a week.* And upon that 15o *Caroli*, in Eaſter-Term (as you may ſee before) a Prohibition was prayed, and granted. And now *Littleton* the Kings Sollicitor came in Court, and moved for a Conſultation: and he ſaid, that the Statute of *Articuli Cleri* gave power unto the Eccleſiaſtical Court to have conuſance of thoſe and the like words. *Regiſter* 49 *F. N. B.* 51. They may hold plea for defamation; as for calling Adulterer, or Uſurer. 13 *H.* 7. *Kellaway.* 27 *H.* 8. 14. And he cited many Judgments in the like caſes, where Prohibitions had not been granted: and amongſt others this Caſe. *Mich.* 20 *Jac. inter Lewis & Whitton* Libel in the Eccleſiaſtical Court, for calling him Pander, and no prohibition granted. And the like Caſe was for calling another Pimp, and no Prohibition granted. Juſtice *Jones:* That a Prohibition ſhould be granted; for they have conuſance of defamation, for any thing which is meerly Spiritual, or which doth concern it, where they have conuſance of the principal, elſe not: as in Hereſie, Adultery, and the like: but in this Caſe they have not Conuſance of the principal. True it is, that it is *peccatum:* But if they ſhould puniſh every thing which is Sin, they would altogether derogate, and deſtroy the Temporal Juriſdiction. And therefore if I ſay, that another is an Idle man, or envious, theſe are deadly Sins; and yet they have not Conuſance of them. And he cited *Coltrops* Caſe, adjudged in the Common pleas, which was our very Caſe in point: and there he ſaid that upon ſolemn debate it was adjudged, That a Prohibition ſhould be awarded. *Bramſton* Chief Juſtice agreed. *Barckley* contrary, That a Conſultation ſhould

be

be awarded: and he ſaid, in many Caſes, although they have Juriſdiction of the principal, yet they ſhall not have Conuſance; as in the Caſe of 22 E. 4. *tit' Conſultation.* But he ſaid, that the Offence of Drunkenneſs is mixt, and is an offence againſt the Spiritual, and Common Law alſo; and if it be mixt, both may hold plea: and Adultery and Murder are the common effects of Drunkenneſs; which are offences againſt both Laws, and therefore he ſhall be puniſhed by both. But yet *Barckley* yielded to the Judgment cited by *Jones.* And therefore the whole Court (*Crooke* being abſent) was, That a prohibition ſhould be awarded.

104. *Rolls* moved this Caſe: The Pariſhioners of a certain Pariſh in *Devonſhire*, did alledge a Cuſtom to chuſe the two Churchwardens of the Pariſh, and they did ſo; the Parſon choſe another: and the Archdeacon ſwore one of the Churchwardens choſen by the Pariſh, and refuſed to ſwear the other, but would have ſworn him who was choſen by the Parſon. And becauſe they did refuſe him, they were Excommunicate. *Rolls* prayed a *Mandat* to the Archdeacon, to compel him to ſwear the other choſen by the Pariſh; and a Prohibition alſo, by reaſon of the Excommunication. And he cited a preeedent for it, which was the caſe of *Sutton-Valence* in *Kent.* And the whole Court (*Crooke* being abſent) inclined to grant them: for they ſaid, they conceived no difference betwixt *London* and the Country, as to that purpoſe: for as in *London* they are a Corporation, and may take Land for the benefit of the Church: So throughout *England*, they are a Corporation, and capable to take, and purchaſe Goods for the benefit of the Church. And therefore they did conceive there was no difference. See the caſe before, the caſe of the Pariſh of Saint *Ethelborough*, *London.*

105. *Keeling* moved to quaſh an Indictment of Reſcous, becauſe it is ſhewed that the Reſcous was at *W.* and doth not

ſhew that *W.* was within this County; and if it was not within the County, then it was an Eſcape, and no Reſcous: And we cannot aver in this caſe, that it was out of the County. Farther, it was not ſhewed where the Reſcous was, ſo that upon the matter it is no Arreſt; nor was the Indictment *vi & armis*, as it ought to be. As to the firſt, the Court ſtrongly inclined, that they might well intend it to be within the County, becauſe the Indictment ſays, *in Com. meo. apud W. tent.* But for the other Exceptions, the Indictment was quaſhed.

106. In Treſpaſs of Aſſault and Battery, and Wounding, the Defendant pleaded *Not Guilty*, as to the Wounding; and pleaded ſpecial matter of juſtification as to the Aſſault and Battery; and found for the Plaintiff; and it was moved in arreſt of Judgment, That the plea was repugnant, for Aſſault and Battery doth imply Wounding, and therefore it is repugnant for him to juſtifie it, for it is a confeſſion of wounding. But Juſtice *Crooke* and Juſtice *Barekley* (the others being abſent) were clear, that the plea was good; for ſo is the common form of pleading: and farther, he might be guilty of the Battery, and not of the wounding: for *Crooke* ſaid, Wounding implied Aſſault and Battery; but not *è contra*.

Brookes *againſt* Baynton.

107. IN a Writ of Error to reverſe a Judgment given in the Court of Common pleas, in Treſpaſs for aſſault, battery and wounding; it was aſſigned for Error, by *Maynard*, That there was variance betwixt the Original and the Declaration; for the Original was only of Battery and Wounding of himſelf; and he declared of Battery and wounding of him and his horſe alſo; for he ſaid, that *quendam equum*, upon which the Plaintiff *equitavit, percuſſit, ita quod cecidit, &c.* and that was not helped by the Statute. But *Rolls* contrary, and here is no variance: for the alledging of ſtriking of the horſe was only inducement to alledge the Battery of himſelf; for he doth not bring the Action for the beating

beating of his horſe, for it was not alledged that it was his own horſe, but *quendam equum*; and for that reaſon, by the whole Court the Judgment was affirmed.

More of the Caſe of Leake *againſt* Dawes.

108. SErjeant *Mallet* for the Plaintiff, That the *Scire facias* is good, notwithſtanding the exceptions, for theſe reaſons. Firſt, becauſe it is not a Declaration, but a Writ, which is not drawn by Counſel; and it is to declare the matter briefly; but if it were in a Declaration, yet I hold it good, becauſe he ſaith, that it was *modo & adhuc ſeiſitus exiſtit*, which as I conceive, helps it: and beſides, it is not his title, but the title of his Adverſary, which he is not bound to plead ſo exactly as his own title. See for that, 14 *Eliz. Dyer.* 204. 2 *Car.* betwixt *Green* and *Moody*, in *Audita Querela*, he ſhewed that there was Debt brought upon a Leaſe for years, to begin at a day to come, and did not ſhew whether the Leſſee entred before the day or not, ſo as he might be a diſſeiſor: and yet notwithſtanding, it being in *Audita querela*, which is an equitable Action, it is good. *Hil.* 1 *Jac.* betwixt *Blackſton* and *Martin* in this Court, a *Scire facias* was brought to avoid a Statute, and it was ſhewed that the Defendant was Tenant, but doth not ſhew how Tenant; but it ſaid *ad grave damnum*, which could not be, if he were not lawful Tenant; and therefore adjudged good, notwithſtanding that general allegation. See new Book of *Entries*, *Mollins* caſe 98, 99. a ſtrong caſe to this purpoſe. Beſides, he ſaid, That here iſſue was taken upon another point, Whether he bargained or not; and therefore he conceived in this *Scire facias*, that it is not here needful to ſhew the Inrolment; and for theſe reaſons, prayed Judgment for the Plantiff. Serjeant *Wild* for the Defendant, That the ſhewing of the Inrolment is not helped by the Iſſue joyned, being matter of ſubſtance; for he ſaith, that *virtute cujus*, and of the Statute of 27 *H.* 8. of uſes, that the Defendant was ſeiſed, and we ought not to intend an Eſtate by any other means or ſeiſin, than himſelf hath alledged. And therefore

fore it ought to be adjudged upon his own pleading, whether the Defendant hath any eſtate without inrolment or entry, by force of the Statute of Uſes. And I conceive he hath not. True it is, that all circumſtances ought not to be pleaded, but the ſubſtance, *viz.* the Inrolment; and therefore it ought to be pleaded, as *Fulmerſton* and *Stewards* caſe is in the Commentaries, and 2 *Eliz. Dyer*. And no eſtate paſſeth without Inrolment: not a Fee-ſimple; for then there ought to be Inrolment according to the Statute: and no eſtate at will can paſs without Entry, for that is as *oppoſit' in objecto*, that a man ſhall be tenant at will againſt his will; for his Entry proves his intent to hold at will. For *Littleton* ſaith, By force whereof he is poſſeſſed; ſo that there ought to be poſſeſſion to make an Eſtate at will. And in caſe of a Leaſe for years, although it be true that he is a Leſſee for years to many purpoſes before Entry, yet an Entry ought to be pleaded. And *Dyer* 14. is *non habuit*; *non occupavit* is no good plea in a Leaſe for years; contrary in the caſe in a Leaſe at will; which is a ſtrong proof, that he is not Leſſee at will before entry. 3 *Jac.* betwixt *Bellingham* and *Fitzherbert*. 5. *El. Dyer* 10 *Eliz. Mockets* caſe, & *Mich.* 15 *Jac.* betwixt *Coventry* and *Stacie*, reſolved that a releaſe to the Bargainee before Inrolment is not good: And by conſequence he hath not an eſtate at will before Inrolment, or Entry made; for if he had, the Releaſe ſhould be good. 18 *H.* 8. the Lord *Lovells* caſe, that no eſtate at Will. Laſtly, *Parrolls ſont plea*, and the caſe of a man ſhall not be taken to be otherwiſe than he hath pleaded it; and he having pleaded that *virtute cujus*, and of the Statute of Uſes, that the Defendant was ſeiſed, he ſhall be concluded thereby. 5 *H.* 7. A man ſhewed, that another licenced him to enter into his land and occupy for a year, it is not good, but he ought to plead it as a Leaſe. Beſides, the *virtute cujus* is not traverſable, as the 11 *Rep. Pridle* and *Nappers* caſe is. *Rolls* accord, and he ſaid, That if it ſhall be conſtrued, That the Conuſee ſhall have an eſtate by Diſſeiſin, the Plaintiff ought to plead it, that the Defendant was ſeiſed by way of diſſeiſin. And where it was objected, That this is a

Writ,

Writ, and not a Declaration, he anſwered, It is a Writ and Declaration alſo; and therefore he ought to declare his caſe at large, and the defect of the Conveyance, *viz.* the want of Inrolment is not ſupplied by the *virtute cujus*. And he having made that his Title, you ought to judge upon it, and not otherwiſe. But the whole Court, *viz.* *Bramſton* Ch. Juſt. *Crooke*, *Jones*, and *Barckley*. Juſtices, That the *Scire facias* was good, for it was ſaid that the Defendant *perquiſivit ſibi & heredibus ſuis*, and concludes, *virtute cujus*, and of the Statute of Uſes, he was ſeiſed; which is a good averment that he hath a Fee, and it was not material how he hath it: and he need not ſhew his Title ſo fully, being a ſtranger to it. And this being an equitable Action, if the Court upon this Writ ſhall conceive ſufficient matter, upon which the Plaintiff may bring his Action, it is good: and the Court ought to give Judgment for him: for being but matter of form, it is not material, unleſs a *Demurrer* had been ſpecial upon it. And wherſoever there is damnification, there the Court ought to give Judgment for the Plaintiff, notwithſtanding a defect of form in the Writ. And *Barckley* ſaid, That if a man be ſeiſed of *Bl.* acre and *Wh.* acre, and acknowledgeth a Statute; and afterwards makes a Leaſe for years of *Wh.* acre, the remainder over in Fee, & then the Conuſee purchaſe *Bl.* acre, and extendeth the land of the Leſſee for years; he held, that he in the remainder ſhould have an *Audita querela*, or a *Scire facias* for the damnification, which came to his intereſt. And he held, that he who had but *intereſſe termini* ſhould have an *Audita querela*, That one jointly only might have an *Audita querela*, and that the death of one of them ſhould not abate the Writ. And he held that *Ceſtui que uſe* before the Statute, might have an *Audita querela*: all which proves it to be but an equitable Action, upon which the Law doth not look with ſo ſtrict an eye, as upon other Actions. And as to the Objection which was made by *Rolls*, that he ought to ſhew, That the Conuſee had an eſtate by diſſeiſin: *Jones* was againſt that, for that no man is bound to betray his Title. And for theſe reaſons it was adjudged by the whole Court, That the Judgment ſhould be affirmed.

109. A Writ of Error was brought to reverſe a Judgment given in the Common pleas, and after a *Certiorari*, and Errors aſſigned, they in the Common pleas did amend the Record. And by the whole Court (*Crooke* only abſent) they cannot do it, for after a *tranſmittitur*, they have not the Record before them. And *Barckley* ſaid, That the difference ſtands betwixt the Common Pleas and the Kings Bench, and betwixt the Kings Bench and the Exchequer. For the Record remains always in this Court, notwithſtanding a Writ of Error brought in the Exchequer-chamber; and therefore we may amend after. Wherefore the Court ſaid, that if the thing were amendable, that they would amend it. But the Court of Common Pleas cannot.

Sewel *againſt* Reignalls.

110. THe caſe was thus: Husband and Wife did joyn in an Action of Debt in the right of the Wife, as Adminiſtratrix to *J. S.* And the Defendant being arreſted at their ſuit, did promiſe to the Husband, in conſideration that the Husband would ſuffer him to go at large, that he would give him ſo much. The husband and wife did joyn in an Action upon the Caſe, upon the promiſe made to the husband alone. And upon *Non aſſumpſit* pleaded, it was found for the Plaintiff. *Porter* moved in arreſt of Judgment, that the promiſe being made to the husband only, that they ought not to joyn in the Action. *Barckley*: the Action is well brought, for the husband is Adminiſtrator in the right of the wife: forotherwiſe the conſideration were not good. For if he were not Adminiſtrator, then he could not ſuffer him to go at large: and then if he be Adminiſtrator in the right of his wife, the promiſe which is made to the husband, is in judgment of Law alſo made to the wife; and they ought to joyn in the Action. But *Crooke*, *Jones*, and *Bramſton* Chief Juſtice contrary, That the Action will not lie, becauſe the promiſe is of a collateral thing, and not touching the duty due to the wife, as Executrix, for then perhaps it would have been otherwiſe,

wiſe. And they ſaid (againſt the Opinion of *Barckley*) that this ſum received ſhould not be aſſets in their hand. And *Bramſton* ſaid, that it is not like the caſe, where a man promiſeth to the father of *Jane Gappe*, in conſideration of a marriage to be had betwixt his daughter and him, that he would make her a Joynture; there as well the daughter as the father may bring the Action. And it was adjourned.

111. A Parſon Libelled in the Eccleſiaſtical Court for Tithes. And after Sentence *Rolls* moved for a Prohibition upon the Suggeſtion of a *Modus decimandi*; but it was not granted, becauſe too late. But *Rolls* took this difference, and ſaid, that ſo had been the Opinion of the Court, where the party pleads the *Modus*, and where not; for if he plead it, there notwithſtanding a Sentence, Prohibition hath been granted; contrary where he doth not plead it. But notwithſtanding the Court refuſed to grant a Prohibition.

112. The Pariſhioners of a Pariſh, together with the Parſon, ſued the Churchwardens in the Eccleſiaſtical Court, to render Accompt, and recovered againſt them, and Coſts taxed. Afterwards the Parſon releaſed the Coſts, and notwithſtanding the Pariſhioners ſued for the Coſts: and thereupon a Prohibition was prayed; becauſe that the Coſts are joyntly aſſeſſed, and the releaſe of one would bar the others. But the Opinion of the whole Court, that a Prohibition ſhall not be granted: For the coſts recovered there, an Action might be ſued in the Eccleſiaſtical Court: and therefore although that in our Law, the releaſe of one ſhall bar the others; yet the Action being ſued there, and they having conuſance thereof, the ſame is directed according to their Law. And therefore it hath been adjudged, that if the husband and wife ſue in the Eccleſiaſtical Court for the defamation of the wife, and Sentence be given for them, and Coſts taxed, and afterwards the husband releaſeth the coſts, in the ſuit commenced in the Eccle-

ſiaſtical Court, it ſhall not bar the Wife, for the reaſons given before.

Brooke *and* Booth *againſt* Woodward *Adminiſtrator of* John Lower.

113. IN Debt upon a Bond, the Defendant prayed Oyer of the Condition, which was entred, *in hæc verba*. *The Condition of this Obligation is ſuch, That if the Obligor did deliver to the Plaintiffs two hundred weight of Hops in conſideration of ten pounds already paid, and fifty five pound to be paid at the delivery; and the Plaintiffs to chuſe them out of twenty four Bags of the Obligors own growing, and to be delivered at* F. *at a day certain. Provided, that if the Plaintiffs ſhould diſlike their Bargain, that then they ſhould loſe their ten pounds: and if they liked, they ſhould give ten pounds more*, &c. Upon Oyer of which, the Defendant pleaded, that the Plaintiffs *non elegerunt*. And upon that the Plaintiffs did Demur in Law: and ſhewed for ſpecial cauſe of Demurrer, that the Plea was double. *Withrington* for the Plaintiffs, that the Plea is double, in that the Defendant hath alledged, that he was ready, and that the Plaintiffs *non elegerunt*; which are both iſſuable pleas, and each of them, of it ſelf (admitting no requeſt of the part of the Defendant requiſite) is ſufficient in bar of the Action. Beſides, he conceived, as this caſe is, that the firſt act ought to be done by the Defendant; for he ought to ſhew the bags, and requeſt the Plaintiffs to make election. And he compared it to the caſe in 44 E. 3. 43. and alſo to *Hawlins* caſe, 5 *Rep.* 22. Farther, he conceived that the Defendant ought to have alledged, that he had twenty four bags, and twenty four bags of his own growing: for if he have not them, it was impoſſible for the Plaintiffs to make choice, and by conſequence the condition broken. *Twiſden* contrary, That the plea is not double, for the alledging himſelf to be ready, was but inducement to the ſubſequent matter, *quod non elegerunt*. And he

he relied only upon their election; and in proof thereof he relied upon the Books, 1 *H.* 7. 16. and 24 *E.* 3. 19. Farther, here no notice is requiſite, nor he ought not to aver that he had them; for he being bound to deliver them, he is eſtopt to ſay that he hath them not. 19 *Eliz. Dyer* 314. and 3 *Eliz. Dyer.* As to the ſhewing of them, we ought not to do it, for the Plaintiffs ought to do the firſt Act, *viz.* Requeſt the Defendant to ſhew the bags for them to make choice of. And the whole Court ſtrongly enclined againſt the Plaintiffs, for the reaſons before given; and they adviſed them to waive the Demurrer, and plead *de novo*; which they did.

Thorps *Caſe.*

114. IN an Action upon the Caſe upon *Aſſumpſit*, it was agreed by the whole Court, That where there is a mutual promiſe, *viz.* *A.* promiſeth to *B.* that he will do ſuch a thing; and *B.* promiſeth to *A.* that in conſideration thereof, that he will do another thing; If *A.* bring an Action againſt *B.* and alledge a breach *in non faciendo*, and ſaith that he is ready to do the thing which he promiſed, but that the other refuſed to accept of it: Notwithſtanding the breach is well laid, and the Action well lieth; for it was idle, and more than the Plaintiff was compelled to do, to ſhew that *paratus eſt* to do the thing which he promiſed: So that if there were a breach upon the part of the Defendant, it is ſufficient, and if there was a breach on the Plaintiffs part, the Defendant ought to bring his Action for it. And the difference was taken by *Bramſton*, Where the promiſe is conditional, and where abſolute, as in our caſe. And agreeing with this difference, it was ſaid at the Bar and Bench, That it was adjudged.

115. *Hutton* moved to quaſh certain Preſentments, becauſe they were taken in a Hundred-Court, which is not the Kings Court; and therefore *coram non Judice*. It was ſaid by Juſtice *Jones*, That a Hundred may have a Leet appendant to it; and

then they were lawfully taken. *Barckley* and the whole Court answered, because it doth not appear to the Court, whether there was so or not, that the Presentments were void.

116. Concerning damage clear, It was agreed, that it was hard that the Plaintiff should be stopt of his Judgment until he had paid his damages clear. For perhaps, if the Defendant be *insolvant*, the Plaintiff should pay more for damages clear, than he should ever get. And therefore the Court was resolved to amend it. This damage clear, is twelve pense in the pound of the damages given to the party in this Court, and two shillings in the Common pleas. See the *Register*, where is a Writ for damage clear.

Harris *against* Garret.

117. IT was agreed by the whole Court, that it is no good plea to say, That such an one was bound in a Recognisance, and not to say *per scriptum obligat'*; and to conclude that it was *secundum formam Statuti*, doth not help it. But in a Verdict it was agreed to be good. And according to this difference, it was said by the Court, That it was adjudged in *Goldsmiths* case, and *Fulwoods* case.

118. It was agreed by the Court, that upon a *Certiorari* to remove an Indictment out of an Inferiour Court, that the Defendant shall be bounden in a Recognisance to prosecute with effect, *viz.* to Traverse the Indictment, or to quash it for some defect. And if he doth not appear, an Attachment shall issue out against him.

Justice Crooks *Case.*

119. IT was agreed by the Court, That although a Bill be preferred in the Starchamber against a Judge for Corruption, or any other, for any great misdemeanour; yet if the Plaintiff

Plaintiff will tell the effect of his Bill in a Tavern, or any other open place, and by that means ſcandalize the Defendant; that the ſame is puniſhable in another Court, notwithſtanding the ſuit dependant in the Starchamber: And ſo *Jones* ſaid, that it was adjudged in a Bill in the Starchamber againſt Juſtice *Crooke*; which was abated, becauſe it was brought againſt him as Sir *George Crooke* only, without addition of his Office and Dignity of Judge.

Trinit. 16° Car' *in the Common Pleas.*

120. AN Apothecary brought an Action upon the Caſe, upon a promiſe for divers Wares and Medicines, of ſuch a value, and ſhewed them in certain. The Defendant pleaded in Bar, that he had paid to the Plaintiff *tot & tantas denariorum ſummas*, as theſe Medicines were worth, and doth not ſhew any ſum certain. And the plea was holden to be no good plea; wherefore Judgment was given for the Plaintiff.

121. A Contract was made betwixt *A.* and *B.* Mercers, That *A.* ſhould ſell to *B.* all his Mercery Wares, and take his Shop of him: In conſideration of which, *A.* promiſed that he would not ſet up his Trade in the ſame Town. And adjudged a good *Aſſumpſit* in the Kings Bench, as *Littleton* Chief Juſtice ſaid. But if one be bound that he will not uſe his Trade, it is no good Bond.

122. *Rolls* moved this Caſe: A Writ of Error was brought upon a Judgment given in *Yarmouth*, and the Caſe was thus: *A.* and *B.* were bound to ſtand to the Arbitrament of *J. S.* concerning a matter which did ariſe on the part of the wife of *B.* before coverture. *J. S.* awarded, That *A.* ſhould pay to *B.* and

and his wife ten pounds, at a place out of the Jurisdiction. And thereupon, upon an Action brought upon the Bond, a Breach was assigned for not payment of the mony at the place. And here it was objected, That it was Error, because it was there assigned, for Breach, the not payment of the mony at a place out of Jurisdiction: and for that cause the Judgment was not well given. Secondly, because that the Award was, That payment should be made to *B.* and his wife, which was out of the Submission. But notwithstanding, Judgment was affirmed by the whole Court. For as to the first, issue could not be taken upon payment or not payment out of the Jurisdiction; because it was not Traversable. As to the second, the Controversie did arise by reason of the wife, and therefore the Award was within the Submission, being made that the payment should be to both.

123. It was said by the Court, that it was one *Kellwayes* Case, adjudged in this Court, That a Promise made to an Atturny of this Court, for Solliciting of a Cause in Chancery, was good; and that it was a good consideration, upon which the Atturny might ground his *Assumpsit*: For it was resolved, That it was a lawful thing for an Atturny to Sollicite.

124. The Court would not give way for Amendments in Inferiour Courts.

125. By *Jones* and *Barckley* Justices, If there be an insufficient Bar, and a good Replication, after a Verdict, there shall be a Repleading. Contrary, where there is no Verdict.

Smithson *against* Simpson.

126. A. And *B.* were bound to stand to, and observe such Article, Agreement, Order, or Decree, as the Kings Council of the Court of Request should make. *A.* brought

brought an Action upon the Bond againſt *B.* and pleaded that the Kings Councel of the Court of Requeſt made ſuch Order and Decree, and that the Defendant did not obſerve it. The Defendant pleaded, That the King and his Council did not make the Decree: and adjudged by the Court that the Plea was not good.

127. Sir *Matthew Minkes* was Indicted of Manſlaughter, and found *Guilty*. And it was moved by *Holborne*, of Counſel with Sir *Matthew*, that the Indictment was inſufficient, becauſe there was *dans &c.* without *adeunc & ibid.* according to Preſidents; as alſo becauſe it was *plagam ſeu contuſionem*, which is incertain: as alſo that the party killed *languebat à pred' 15 die, uſque decimam ſextam*. And he ſaid, That there was no time between thoſe two days, but it ought to have been, That he languiſhed from ſuch an hour till ſuch an hour; and that, he ſaid, were the ancient Preſidents. And he ſaid, That an Indictment that *A.* killed *B. inter horam decimam & undecimam* was adjudged to be naught. And he took many exceptions: all which were diſallowed by the Court. For which cauſe Sir *Matthew* prayed his Clergy, and had it.

Paſch. 17° Car. *in the Common Pleas.*

Weeden *againſt* Harden.

128. CUſtome to pay Tithes in kinde for Sheep, if they continue in the Pariſh all the year; but if they be ſold before ſhearing-time, but an half-penny for every one ſo ſold. And cuſtome in the ſame Pariſh alſo, to pay no Tithes of Loppings or Wood for fire, or Hedges, *&c.* The firſt is an unreaſonable cuſtom; for by ſuch means the Parſon ſhall be defeated of his Tithes. But the laſt cuſtom is good, by the whole Court.

Sir

Sir Edward Powells *Caſe.*

119. THe Lady *Powell* ſued Sir *Edward Powell* her huſband, in the High Commiſſion Court for Alimony. Whereupon a Prohibition was prayed in this Court, and granted. Serjeant *Clark*, who argued for the Prohibition: The Spiritual Court cannot meddle with any thing which is not redreſſable by them: they may compel a man *tractare uxorem*, or Divorce them; but not grant Alimony, which doth appertain to the Judges of the Common Law. 7 & 8 *H.* 3. there is a Writ directed to the Sheriff, to ſet out reaſonable Eſtovers for the Alimony of the wife. Preſident ſince the Statute of 1 *Eliz.* where Prohibitions have been granted in this Caſe. *viz.* Sir *William Chenyes Caſe*, *Mich'* 8 *Jac. in Comm' Banco*, who committed Adultery, and was ſeparated, and the wife ſued for Alimony, and a Prohibition granted. *P.* 8 *Jac.* A Prohibition granted. And by the Statute of 1 *Eliz.* they have not power to hold Plea of Alimony. The words of the Statute are, *Reform*, *Redreſs*, &c. And it is not apt to ſay, that Alimony ſhall be Reformed, or Redreſſed. And beſides, Alimony is a Temporal thing, and chargeth a mans Inheritance: and therefore they ſhall not intermeddle with it. Serjeant *Rolls* contrary, She may ſue for Alimony in the Eccleſiaſtical Court; but if they proceed to Fine or Impriſonment, then a Prohibition lieth. They have power of Separation, which is the principal; and therefore of Alimony, which is Incident. And the High Commiſſion have the ſame power given to them by the Statute of 1 *Eliz.* as the Spiritual Court hath, and therefore they may meddle with Alimony. And where it was before objected, The great inconvenience to the party, by the citing him out of his Dioceſs, for by that he ſhould loſe the advantage of his Appeal: *Rolls* ſaid, It was good for any within the Province, and that is the Court of the Province. *Banks* Chief Juſtice: Although that there be Preſidents, that the High Commiſſion have holden Plea of Alimony, and granted the ſame, yet it was not Law. And although

though that Alimony be expreſſed in their Commiſſion, that doth not make it Law, if it be not within the Statute. As to the citing out of the Dioceſs, he conceived the Commiſſion ſhould be uſeleſs, if they might not do it : and therefore he granted a Prohibition. *Crawly*, *Reeve*, and *Foſter* Juſtices, agreed. But they doubted whether the citing out of the Dioceſs were good or not, for the great prejudice which might enſue to the party in loſing his Appeal. And in anſwer to the Objection of *Rolls*, the Chief Juſtice ſaid, That the Eccleſiaſtical Court had not Juriſdiction of Alimony; but if they had, yet all the Juriſdiction of the Spiritual Court is not given to the High Commiſſion, by the Statute of 1 *Eliz.* And they all agreed, That they might as well charge my Land with a Rent-charge, as grant Alimony out of it; and a Prohibition was granted. Cro. 2. Cro. 264.

130. No Sequeſtration can be granted by a Court of Equity, until the Proces of contempt are run out. And by *Reeve* and *Foſter* Juſtices, The granting of Sequeſtration of things collateral, as of other Lands or Goods, is utterly illegal.

131. Whereas upon Suggeſtion of a *Modus decimandi*, a Prohibition was granted: now a Conſultation was prayed as to Offerings, and granted; becauſe the *Modus*, &c. doth not go to the perſonalty.

132. Upon a Jury returned, a ſtranger who was not one of the Jury, cauſed himſelf to be ſworn in the name of one who was of the Jury. And he againſt whom the Verdict paſſed, moved the Court for a new Trial upon that matter. But the Court would not give way to it; becauſe it appeareth to them that he is ſworn upon Record. But all the Court agreed that he might be Indicted for that Miſdemeanour: and by *Reeve* and *Foſter* Juſtices, the parties may have an Action upon the Caſe againſt him.

133. It was taken for a Rule by the Court, That no Amendment ſhould be after a Verdict, without a conſent.

134. Trover and Converſion againſt husband and wife, and declared that they did convert *ad uſum eorum*. The Jury found the wife not guilty. And by the Court, this naughty Plea is made good by the Verdict.

Sir Richard Greenfields *Caſe, in the Kings Bench.*

135. THou (innuendo *Captain* Greenfield) *haſt received mony of the King to buy new Saddles, and haſt conſened the King, and bought old Saddles for the Troopers. Trever:* It is not actionable. 8 *Car.* The Mayor of *Tivertons* caſe: One ſaid of him, *That the Mayor had conſened all his Brethren, &c.* not actionable, 9 *Jac.* in the Kings Bench, *That the Overſeers of the Poor had conſened the poor of their Bread*, not actionable. 26 *Eliz.* in the Kings Bench, *Kerby* and *Wallers* caſe, *Thou art a falſe Knave, and haſt conſened my two Kinſmen*, not actionable. *K. is a conſening Knave*, not actionable. 18 *Eliz.* in the Kings Bench. *Serjeant* Fenner *hath conſened me and all my Kindred*, is not actionable. Words are actionable either in reſpect of themſelves, or in relation to the perſon of whom they are ſpoken: where Liberty is infringed, the Eſtate impaired, or Credit defamed; there they are actionable. *Mich.* 29 *H.* 8. *Rot.* 11. *Villain*, is not actionable. *Morgan* and *Philips* caſe. *That he is a* Scot, actionable, becauſe he is an Alien born. *Hill.* 1 *Car. in Com. Ban.* Sir *Miles Fleetwoods* caſe. *Mr. Receiver hath conſened the King*, actionable in reſpect of his Office of Receiverſhip. And ſo it was afterwards adjudged upon Error brought in the Kings Bench. If theſe words had been ſpoken of the Kings Saddler, they had been actionable, for thereby he might loſe his Office: but there is no ſuch prejudice in our caſe; and he is of another Imployment, and is but for a time only. But by *Heath* Juſtice,

Justice, and *Bramston* Chief Justice, the words are actionable, for it is not material what imployment he hath under the King, if he may lose his imployment or trust thereby. And it is not material whether the imployment be for life or years, &c.

136. A Lawyer who was of Counsel may be examined upon Oath as a Witness to the matter of Agreement, not to the validity of an assurance, or to matter of Counsel. And in examining of a Witness Counsel cannot question the whole life of the Witness, as that he is a Whoremaster, &c. But if he hath done such a notorious fact which is a just exception against him, then they may except against him. That was *Onbies* case of *Grays-Inn*; and by all the Judges it was agreed as before. And by *Reeve* Justice, If a Counsellor say to his Client, that such a Contract is Simony, and he saith, he will make it Simony, or not Simony: And thereupon the Counsellor that a Simoniacal Contract, it is no offence in the Counsellor.

Pasch. 17° Car. *in the Kings Bench.*

137. PRescription to have Common for all his cattle Commonable, is not good, for thereby he may put in as many beasts as he will. But a Prescription to have Common for his cattle commonable *levant* and *couchant*, is a good Prescription. And it was said, that that was *Sayes* case of the County of *Lincoln* adjudged in this Court.

138. In *Tompson* and *Hollingsworths* case, it was agreed, That a Court of Equity cannot meddle with a cause after it hath received a lawful Trial and Judgment at the Common Law, although that the Judgment be surreptitious.

139. The Statute of 31 *Eliz.* enacts, That if a man be presented, admitted, instituted, and inducted upon a Simoniacal contract, that they shall be utterly void, *&c.* Whether the Church shall be void without deprivation, or sentence declaratory in the Spiritual Court or not, was the Question in a *Quare impedit* brought by Sir *John Rowse* against *Ezechiel Wright*. *Rolls* and *Bacon* Serjeants, That it is absolutely void without sentence declaratory, *&c.* Where the Statute makes a thing void, it shall be void according to the words of the Statute, unless there shall be inconvenience or prejudice to him for whom the Statute was made. The Statute of 8 *H.* 6. *cap.* 10. That an utlagary shall be void if process do not issue to the place where the party is dwelling; yet it is not void before Errour brought. The Statutes of 1 *Eliz.* & 31 *Eliz.* That all Leases by a Bishop not warranted *&c.* shall be void: They are not void, but voidable only; which agreeth with the reason of the Rule given before. The Statute of 18 *H.* 6. 6. That if the King grant Lands by Patent not found in the Office, that the Patent shall be void; it is void presently, *M.* 30 *H* 6. *Grants* 92. and *Stamford* 61. although they be ~~matter of Record~~. The Statute of 31 *Eliz.* is expressly that it shall be void, frustrate, and of none effect; therefore by the Rule before given, it shall be absolutely void. *M.* 10 *Jac. Stamford* and Dr. *Hutchinsons* case. Resolved that an Incumbent presented by Simony cannot sue for Tythes against his Parishioners; a villain purchaseth an Advowson, the Church becomes void, the Lord presents by Simony, and the Clark is admitted, Instituted, and inducted, yet it is void, and doth not gain the Advowson to the Lord. *Institut.* 120 *a.* If an Incumbent take a second Benefice, the first is meerly void. 4 *Rep. Hollands Case.* The difference is, where it is of the value of 8 l. where not. And there is difference betwixt avoidance by Statute, and avoidance by the Ecclesiastical Law. Avoydance is a thing of which the Common Law takes notice, and shall be tried by Jury if it be avoydance in fact; if an avoydance in Law, by the Judges. If a Parson doth not read the Articles according to the Statute of 13 *Eliz.* it is *ipso facto* void, without sentence.

6 *Rep.*

6 *Rep* 29. *Greens* caſe 30 *Eliz. Eatons* caſe. *Inſtit.* 120. a. expreſs in the point. And the difference is, that before the Statute of 31 *Eliz.* it was only voidable by deprivation; but now by the Statute it is abſolutely void. *Mich.* 9 *Jac. Cobbert* and *Hitchins* caſe. *Mich.* 42 *Eliz. Baker* and *Rogers* caſe. 2 *Jac. Goodwins* caſe, *in Com' Banc.* in all which caſes it was not reſolved, but paſſed tacitely, and without denial, That a Preſentation by Simony was void, without declaratory Sentence. It was objected, that it is clear by the Eccleſiaſtical Law, it is not void without a Sentence declaratory. It is anſwered, Of things of which our Law and the Eccleſiaſtical Law take conuſance, we are only to relie upon our Law, and not upon the Eccleſiaſtical Law: eſpecially when the Eccleſiaſtical is repugnant or contrary to our Law, as in this Caſe it is. The Judges of the Common Law ſhall judge the Church void, or not void. *Fitz. Annuity* 45. 12 & 13 *Jac.* in the Kings Bench, *Hitchin* and *Glovers* caſe, in an *Ejectione firmæ*. In this caſe it was reſolved, That if *J. S.* marry two wives, the Judges of the Common Law may take conuſance of it: yet marriage is meerly an Eccleſiaſtical thing. It was objected, That the firſt branch of the Statute of 31 *Eliz.* that it ſhall be void, &c. Secondly, that it ſhall be void as if he were naturally dead, &c. So that the adding of theſe words (as if he were naturally dead) in the later clauſe, prove that it was the meaning of this Statute, that it ſhould not be void in the firſt caſe, without Sentence declaratory. It is anſwered, There is a difference in words, not in ſubſtance, or the intent, & *qui hæret in litera*, &c. *Fermin* and *Taylor* Serjeants, That it is not void before Sentence, &c. Firſt, Admiſſion, Inſtitution, and Induction, are Judicial acts, and done by the Biſhop: and therefore ſhall not be void before an act done to make them void, which is Sentence declaratory, or deprivation. Secondly, the Statute of 31 *Eliz.* ſaith, it ſhall be void, not that it is, &c. Thirdly, the Eccleſiaſtical Law is, That no Preſentation, &c. ſhall be void before Sentence, &c. Fourthly, the Eccleſiaſtical Law is Judge of it, &c. Plenarty ſhall be tried by the Biſhop, not by Jury. 6 *Rep.* 49. a. Refuſall

sal shall not be tried by Jury, but Death shall. 5 *Rep.* 57. 9 *H.* 7. Profession shall be tried by the Spiritual Court, 4 *Rep.* 71. b 4 *vid.* 4. *Rep.* 29. a. the credit which our Law gives to the Ecclesiastical Law. It is there put, That one was divorced without his knowledge, which was said to be a strange case. Fifthly, the Presentee by Simony doth remain Incumbent *de facto*, although not *de jure*; and that by the words of the Statute which makes the Church void, as to the King only, not as to the Incumbent, without declaratory Sentence: and the Church is no more capable to have two Incumbents, than a woman to have two husbands. There is a difference where the Incumbent presented by Simony is alive, the same is not void *in facto*, without sentence declaratory: but if he be dead, there it is. And this difference stands upon the two clauses in the Statute of 31 *Eliz.* And the Statute of 17 *Car.* of Election of Burgesses, takes notice of Avoidance *de facto & de jure*. *Trinit.* 16 *Car. in Com. Banc. Ogelbies* case. One was Presented within the age of twenty three years, it did not give Lapse without notice: for it was avoidance in Law, not in Fact. *vid.* Stat. 9. *Eliz.* for Excommunicating a striker in the Churchyard, &c. This Statute of 31 *Eliz.* differs from the Statute of 1° *Eliz.* for not reading of the Articles. Those Statutes say, that it shall be void *ipso facto*, but not so in our Case. And the Cases cited for Authority in the point, are betwixt party and party, and not in case of a third person, as our case is. 18 *Eliz. Dyer* A meer Lay-man is presented, it is not *ipso facto* void, without Sentence. So it is of one within the age of nine years; for he cannot govern others. *Trinit.* 4 *Jac.* in the Common Pleas, *Cooke* and *Stranges* case. The King Presents, and before Institution Presents another, it is good: but in the interim, the King ought to repeal his first presentment, and that is a revocation. *vid. Dyer* 292. a. where it is a Quere, Whether he need not to alledge that a Repeal was brought and shewed, &c. The King grants, and afterwards makes a second Grant of the same thing. There are many Examples in *Brooke* and *Fitzherbert*, that it is not good without a Repeal. But this Case, *viz.* of 6 *H.* 8, 9. extends only

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to Land, and not to an Advowſon, &c. But it was reſolved by all the Judges, That the Church was void by the Statute of 31 *Eliz.* to all purpoſes, and to all perſons, as to the Pariſhioners, as to a ſtranger, who brings Treſpaſs, or *Ejectione firmæ* as to the King, as to him who Preſents; and that without deprivation, or Sentence declaratory in the Eccleſiaſtical Court: And accordingly Judgment was given.

Hichcocke *againſt* Hichcocke.

140. THe Caſe was this: The Vicar did contract with a Pariſhioner to pay ſo much for encreaſe of Tithes, and died; and his Succeſſor ſued in the Eccleſiaſtical court for them. And a Prohibition was prayed, and granted by all the Juſtices. And here it was ſaid, That a real Contract made by the Parſon, and confirmed by the Ordinary, could not be altered in the Spiritual Court. And by Serjeant *Mallet*, a real accord though it be between Spiritual Perſons, and of Spiritual things yet it is only queſtionable at the Common Law. 20 *E.* 3. *Annuity* 32. 38 *E.* 3. 6. 8 & 19. And by Serjeant *Clarke*, Real compoſition by a Parſon, who claims not any encreaſe of the endowment to the Parſonage, ſhall not binde his Succeſſor. The words of the Contract here were, *inter ſe convenerunt*: and that is no real Compoſition, although that the Biſhop call it ſo, *realis Compoſitio*, and his calling of it ſo doth not alter the nature of it, but it remains a Perſonal agreement; and ſo ſhall not bind the Succeſſor, although it be confirmed by the Biſhop. A Parſon cannot do any thing to the damage of his Succeſſor. The Vicar took Oath, That they were not for encreaſe of Tithes: the Ordinary being a ſtranger to the Compoſition, is not made a party by his Confirmation, nor is the Compoſition altered by it. *Littleton Sect.* 335. The Lord confirms the Land to the Tenant, the ſame doth not alter the Tenure, nor prejudice the Lord. The power of the Biſhop, *augendi & minuendi* the Portion of the Vicar, is by the Common Law, for general Cure of Souls. The Parſon and Vicar have privity betwixt them. 40 *E.* 3. 28. 31 *H.* 6. 14.

6.14.16 *Ass. Annuity* 32. 2 *Rep.* 34. *Plow. Com.* 496. 21 E. 3. 5. 10 H. 7. 18. *Dyer* 43 & 84.

141. A Prohibition was prayed to the Court of Requests, and the Case was thus: A Feme sole possessed of a Term, conveyed the same over in Trust for her, and Covenanted with *J. S.* whom she did intend to marry, that he should not meddle with it, and for that purpose took a Bond of him. They intermarried: he may intermeddle with it, but he shall not have it; and by Equity he cannot assigne it, by reason of the Covenant before marriage. A Feme sole conveys a Term in Trust, and then marrieth; the husband assignes it, the Trust, not the Estate shall pass, by *Reeve* and *Foster*. But by all the Judges a Prohibition shall not be, for it is matter only for Equity: But if they dire& *Demisit*, or *non demisit*, *Assignavit*, or *non*, &c. then they exceed their Jurisdiction, and a Prohibition lieth.

142. A woman brought a Writ of Dower, and recovered, and upon a suggestion made upon the Roll that the husband died seised, a Writ of enquiry of Damages issued forth. And before the Retorn thereof, a Writ of Error was brought; and it was by *Steward* against *Steward*; and two things were moved: 1. Whether Error would lie before the Retorn of the Writ of Enquiry, or not. 2. Whether the Writ of Error be a *Supersedeas* to the Writ of Enquiry. And by *Taylor* and *Rolls* Serjeants, That Error doth not lie before Judgment upon the Writ of Enquiry. And this case they compared to *Medcalfes* case 11 *Rep.* 38. But by Serjeant *Bacon* it is well brought. Dower is by the Common Law, and damages are given by the Statute of *Merton*, and that is the main Judgment. 5 *Rep.* 58, 59. And the very case is put in *Medcalfes* case, 11 *Rep.* and distinguished from other cases. And it was argued by another Serjeant, That the Error was well brought, because that in Dower the Judgment doth determine the Original: and therefore at the Common Law Error will well lie. And

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the damages are given by the Statute of *Merton*, but that doth not alter the Judgment, or the nature of the Action. It differs from the caſe of Judgment in an *Ejectione firme*, and Accompt; for after ſuch Judgments *Nonſuit* may be: but not ſo in the caſe of Dower, in which Judgment is, *quod recuperet, &c.* A *Precipe* is brought againſt two, one pleads to iſſue, the other an inſufficient Plea, upon which Judgment is given. No Error lieth before Judgment be given for the other: for the whole matter is not determined. But in ſeveral *Precipes* againſt two, it is otherwiſe. 34 *H.* 6. 18 *Fitz. Scire facias.* 11 *Rep.* 39. a. b. In caſe of *Ejectione firme* it is a Quere if Error may be brought, &c. And *Bankes* Chief Juſtice ſaid, That it had been adjudged both ways: but that differs from our caſe, for in that damages are given by the Common Law. Judgment is, in a *Quare impedit* Error may be brought before, &c. which is like to our caſe, for damages in both caſes are given by Statute. And where it was objected, That thereby damages ſhould be loſt; He anſwered, No. For the Kings Bench may award a Writ of Enquiry of Damages. And the 11 *Rep.* is expreſs Authority. 2. The Error is no *Superſedeas*, &c. 11 *Jac.* in *Tineke* and *Brownes* caſe, it was ruled and reſolved, That a Writ of Error brought, was not a *Superſedeas* to the Writ of Enquiry of damages. But it was reſolved by all the Judges, that the Error was well brought, for the reaſons before given: and that Error is a *Superſedeas* to the Writ of Enquiry. And it was entred for a Rule, That in all Writs of Enquiry of damages, notice ought to be given aſwel in Real as Perſonal Actions.

143. If a Priſoner will remove himſelf by a *Habeas Corpus*, he ſhall pay the Coſts of the Removal: but if the Plaintiff will remove the Priſoner, he ſhall pay reaſonable charges.

144. *Dickenſon* Libelled againſt *Barnaby* in the Spiritual Court for theſe words: D. *is a Beaſtly Queen, Drunken*

Quean, Copper-noſe Quean, and ſhe was one cauſe wherefore Barnaby *left his wife, and hath miſpended five hundred pounds, and that ſhe keeps company with Whores.* And a Prohibition was prayed and granted, becauſe that the words are not actionable.

145. *Hill.* 16 *Car.* in this Court. *A.* a poor man ſold his eſtate for twenty pound yearly, to be paid during his life: for the ſecurity of which, the Vendee was bound to *A.* and another in a thouſand pounds; the other releaſeth the Bond, the mony not being paid. *A.* is compelled to have Relief of the Pariſh for his maintenance. The Churchwardens and *A.* exhibited a Bill in the Court of Requeſts, and there had remedy.

146. *A.* and *B.* his wife Preſent to a Church, to which they have no Right. Queſtion, Whether that doth grant any thing to the wife or no? Reſolved, No. For the wife is at the will of her husband, and Preſentation is but Commendation, or the Act of the husband, *&c.* And it is not like unto an Entry in Land by them. *Mich.* 16 *Car.* betwixt *Neſſon* and *Hampton.* Otherwiſe it is when the wife hath Right.

Sir John Pits *Caſe.*

147. IN the caſe of Sir *John Pits* Philizor of *London*, it was moved, that his Executors might have the profits of the Writs which are to be ſubſcribed with his name, foraſmuch as all Proceſs of the ſame ſuit ought to have the ſame name ſubſcribed to them: for the attendance of them being neceſſary, they ought to have the profits according to it. *Tooleys* caſe, *Hobarts Reports.* The reaſon which was given to the contrary was, becauſe there was another Officer, who is to anſwer any damages, by reaſon whereof he is to have the benefit.

148. Judges are the only Expoſitors of Acts of Parliaments,

ments, although they concern Spiritual things. *Searles* caſe, *Hobarts Rep.* 437. 4 E. 4. 37. 38.

149. If horſes be traced together, they are but one diſtreſs. And note, Fetters upon a horſe leg, may be diſtreined with the horſe.

Hillary 16° Car. *in the Kings Bench.*

150. A Merchant goeth beyond Sea, and marrieth an Alien. It was reſolved, that the Iſſue is a Denizen; for the husband being the Kings ſubject, the wife is not reſpected, becauſe ſhe is at the will of her husband, and alſo becauſe they are but one perſon in Law. *Bacon* and *Bacons* caſe.

151. If a Town hath a Chappel, and bury at the Mother-church, and therefore have time out of mind repaired part of the Wall of the Church, it is good to excuſe them of repairing the Church. Inhabitants of ſuch a place preſcribe to repair a Chappel of Eaſe: and in regard thereof, that they have time out of mind been free from all Reparations of the Mother-church, it is good. But if ſuch a Chappel hath been built within time of memory, then they ought to have proof of ſome agreement, by virtue of which they are diſcharged of Reparations of the Mother-church. *Paſch.* 17 *Car.* in the Kings Bench. The Inhabitants within the Pariſh of *H.* having a Chappel of Eaſe, and cuſtom that thoſe within ſuch a Precinct ought to find a Rope for the third Bell, and to repair part of the Mother-church: in conſideration of which, they have been freed from payment of any Tithes to the

Mother-church. Whether it be a good Cuſtome, or not, *Quere*, for it was Adjorn.

Hillary 16° Car' *in the Common Pleas.*

152. WHere the Eccleſiaſtical Court hath conuſance of the cauſe, there proceedings, although they be Erroneous, are not examinable in this Court. And it was given for a Rule, That it is no cauſe to grant a Prohibition.

153. The Sheriff in the Retorn of a Reſcous, ſaid, that he was in *Cuſtodia Ballivi Itinerantis*. And that a Reſcous was made to his Baily *Itinerant*; and it was not good: otherwiſe, if he had been Bailiff of a Liberty, for the Law taketh notice of him. And therefore the Court did award that the Reſcouſers ſhould be diſmiſſed, and that the Sheriff ſhould bring in the man by a certain day at his peril. Otherwiſe it is in the Kings Bench.

154. One cannot be Attorney within age, becauſe he cannot be ſworn.

155. Commiſſioners have a Warrant, and they execute it with another who is a ſtranger to the Warrant; It is good, and the other perſon is but ſurpluſage.

156. A Prohibition after Sentence ſhall not be granted but in ſome eſpecial caſe.

157. It was Ordered by the Lords Houſe of Parliament, That

That only Menial ſervants, or one who attended upon the perſon of a Knight or Burgeſs of the Parliament, ſhould be free from Arreſt.

158. Adminiſtration is granted to the wife, the husband having many children. Whether it be in the power of the Ordinary to make diſtribution, or not. Firſt, if there be an Executor, then not. Secondly, After diſtribution there may be a Debt which was not known at the time, and then the Adminiſtrator ſhould pay it of his own goods. And therefore there can be no diſtribution. On the other ſide, it was ſaid, If the Ordinary ſhall not diſtribute, then if a man dieth Inteſtate, and hath goods of the value of an hundred pounds, and Adminiſtration be committed to the wife, ſhe ſhould have all, and the children nothing; which would be hard.

159. A thing which may be tried by a Jury at the Common Law, is not triable in Chancery: for in the firſt Caſe, if they give not their Verdict according to their Evidence, an Attaint lieth: but in the other there is no remedy.

160. After a Writ of Error granted, a Warrant of Attorney cannot be filed, if the party be alive who made the Warrant: but otherwiſe if he be dead.

161. A Declaration cannot be amended in matter of Subſtance, without a new Original: otherwiſe of Amendments of matter of Form.

162. The Statute of 5 & 6 E. 6. *cap.* 1. and 1 *Eliz. cap.* 2. prohibite any man to be abſent from Church, having no lawful or reaſonable cauſe. A man was ſued in the Eccleſiaſtical Court for being abſent from Church; and he pleaded ſomething

thing by way of excuſe. *Hyde* Serjeant prayed a Prohibition, becauſe they ought not to hold Plea of the excuſe: but the Court did agree that they might hold Plea of the excuſe, otherwiſe upon a falſe ſuggeſtion you would defeat the Eccleſiaſtical Court of all Conuſans in ſuch caſes. And therefore they were all againſt the Prohibition, and by the Court they ought to plead their excuſe there; and if they will not admit of it, then a Prohibition ſhall be granted. And note, that it was ſaid by *Bankes* Chief Juſtice, that before the Statute of 1 *Eliz.* the Eccleſiaſtical Court might puniſh any perſon for not coming to Church, *pro reformatione morum & ſalute animæ.*

163. Where there are ſeveral *Modus* alledged, there ſeveral Prohibitions ſhall be granted; but where divers are ſued joyntly, and they alledge one *Modus* only, there they ſhall have but one Prohibition, by *Reeve* and *Foſter* Juſtices, the others being abſent.

Paſch. 15° Car' *in the Kings Bench.*

Edwards *and* Rogers *Caſe.*

164. THe Caſe was thus: Tenant for life, the Reverſion to an Ideot; an Unkle heir apparent of the Ideot levied a Fine and died, Tenant for life died, the Ideot died: the only Queſtion was, Whether the Iſſue of the Unkle who levied the Fine ſhould be barred or not: *Jones:* that it ſhould; his chief reaſon was, becauſe the Son muſt make his conveyance by the Father, and as to him he is barred. As in a Writ of Right, he ought of neceſſity to name his Father, and that by way of Title, ſo here. But *Crooke* and *Barckley* contrary; and their reaſon was, becauſe that here the Iſſue of the Unkle doth not claim in the right line, but in the collateral. Secondly, becauſe the naming of the

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father here is not by way of Title, but by way of pedigree only. Note, that Serjeant *Rolls* in the Argument of the Serjeants caſe (which was the very point) ſaid, that this caſe was adjudged, according to the Opinions of *Crooke* and *Barckley*, *viz.* that the fine ſhould not bar the Iſſue. The Serjeants Caſe aforeſaid was *Trin.* 17 Car.

165. *Payne* the elder and *Payne* the younger were bound joyntly and ſeverally in an Obligation to *Dennis*, who afterwards brought Debt upon the Bond againſt both. And after appearance, *Dennis* entred into a Retraxit againſt *Payne* the younger; and whether this were a diſcharge of the elder alſo, was the Queſtion. And this Term it was argued by *Maynard* for the Defendant, that it was a diſcharge of *Payne* the elder alſo, for it doth amount to a Releaſe; and it is clear, that a releaſe to one, ſhall diſcharge both. *Rolls* contrary, that it goeth only by way of Eſtoppel, and not as a releaſe, and therefore ſhall not bar. *Barckley* Juſtice: that it amounts to a Releaſe, and therefore ſhall diſcharge both. 7 E. 4. *Hickmots* caſe in the 7 *Rep.* the Plaintiff ſhall not have judgment where he hath no cauſe of Action. And here by his Retraxit he hath confeſſed, that he hath no cauſe of Action, and therefore he ſhall not have judgment. Further, a Retraxit is not an Eſtoppel, but a Bar of the Action; beſides, here he hath altered the Deed, and it is not joynt, as it was before, like as where he interlines it or the like, there the Deed is altered by his own act, and therefore the other ſhall take advantage of it. *Crook* Juſtice contrary; for it is not a Releaſe, but *quaſi* a Releaſe; and if the Obligee ſueth one, and covenanteth with him that he will not further ſue him, the ſame is in the nature of a Releaſe, and yet the other ſhall not take advantage of it. So in this caſe, 21 *H.* 6. there ought to be an actual Releaſe, of which the other ſhall take advantage, and therefore in this Caſe, becauſe it is but in the nature of an Eſtoppel, the other ſhall not take advantage of it.

07. K. 168.
1 W. Jones 451.
Cro. Car. 551.

Sprigge

Sprigge *againſt* Rawlenſon.

166. IN a Writ of Error to reverſe a Judgment given in the Common Pleas in an *Ejectione firme*, the Caſe was: *R.* brought an *Ejectione firme* againſt *S.* and declared of an Ejectment *de uno meſuagio & uno repoſiterio*. And the Jury found for the Plaintiff, and aſſeſſed damages entire: upon which a Writ of Error was brought here, and the Error which was largely debated was, that *Repoſitorium*, which was here put for a Ware-houſe, is a word uncertain, and of divers ſignifications, as appeareth by the Dictionary. And therefore an *Ejectione firme de uno repoſitorio* is not good, and by conſequence the damages which are joyntly aſſeſſed are ill aſſeſſed. And in an *Ejectione firme* ſeiſin ſhall be given by the Sheriff, upon a Recovery, as in a *Precipe quod reddat*, and therefore the Ejectment ought to be of a thing certain, of which the Sheriff may know how to deliver ſeiſin, otherwiſe it is not good. *Barckley* and *Crook* Juſtices were, that the Judgment ſhould be affirmed, and that it was certain enough; but *Jones* and *Bramſton* Chief Juſtice contrary, that it was utterly uncertain. For that is *Repoſitorium* in which a man repoſeth any thing: and an *Ejectione firme de uno tenemento* is not good, becauſe there are ſeveral tenements. So here, becauſe there are ſeveral Repoſitories, and the Sheriff cannot *tradere poſſeſſionem:* and afterwards *Barckley* releaſed his Opinion, and judgment was given, that the Judgment given in the Common Pleas ſhould be reverſed.

Trinit. 17° Car' *in the Common Pleas.*

167. A Man having a Legacie deviſed unto him out of a Leaſe for years, which Indenture of Leaſe was in the hands of a ſtranger, The Legatee ſued the Executors in the Spiritual Court to aſſent to the Legacie

Legacie. And *Evars* Serjeant prayed a Prohibition, becauſe they order that the Leaſe ſhould be brought into Court, which they ought not to have done, being in the hands of a ſtranger. But the Prohibition was denied by the whole Court, for they may make an executor aſſent to a Legacie out of a Leaſe, and therefore may order that although that the Leaſe be in the hand of a third perſon, that it ſhall be brought in to execute it. For the Order, although it be general, binds only the Defendant; and it was agreed by the Court, that aſſets or not aſſets is triable by them.

Juxon *againſt* Andrewes, *and others*.

168. IN an *Ejectione firme*, the Defendants pleaded not guilty, the Jury found them not guilty for part, and guilty in *tanto unius meſſuagii in occupatione, &c. quantum ſtat ſuper ripam*; and whether this Verdict were ſufficiently certain, ſo as the Court might give judgment upon it, and execution thereupon might be had, was the queſtion. And by *Whitfield* Serjeant the Verdict is certain enough: it hath been adjudged that where the Jury find the defendant guilty of one Acre, parcel of a Mannor, that it was good: ſo of the moiety of a Mannor which is as uncertain as in this caſe. And it is as certain as if they had ſaid, So many feet in length, and ſo many in breadth: for if the certainty appeareth upon the view of the Sheriff, who is to deliver the poſſeſſion, it ſufficeth: and *Clark* Serjeant who was of the ſame ſide ſaid, that it is a Rule in Law, *Quod certum eſt quod certum reddi poteſt*, and this may be reduced to certainty upon the view of the Sheriff, and therefore it is certain enough. Beſides, it is the finding of the Jury who are lay gents. *M.* 8. *Jac.* in the Kings Bench, an *Ejectione firme* was brought for the Gate-houſe of *Weſtminſter*, and the Jury found the Defendant guilty, for ſo much as is between ſuch a room and ſuch a room, and adjudged good, and here it is as uncertain as in our caſe. *Mich.* 19 *Jacobi*. *Smalls* caſe in *Hobarts Rep.* The Jury in an *Ejectione firme* found the Defendant guilty of a third part, and good. *Mallet* Serjeant, that the

Verdict is uncertain, and therefore not good. And it is not ſufficient that the certainty appear to the Jury, for it behooveth that *certa res deducatur in judicium. Inſtitut.* 227. a. 3 E. 3. 23. b. 18 E. 3. 49. 40 E. 3. 5 *Rep. Playtors* caſe. Secondly, here is no certainty for the Sheriff to give execution, for ſo much in length or in breadth, that is, *quod ſtat ſuper ripam*, doth not appear. And thirdly, thereupon great inconvenience will ariſe, that no attaint will lie upon ſuch uncertain Verdict, ſo as the defendant ſhall be without remedy: and the whole Court (except Juſtice *Crawley*) *Banks*, *Reeve*, and *Foſter*, did reſolve that the Verdict was inſufficient for the incertainty, and all agreed, That there is great difference betwixt Treſpaſs and *Ejectione firme*, for ſuch Verdict in Treſpaſs may be good, for there damages are only to be recovered, but in an *Ejectione firme* the thing it ſelf. And their reaſon in this Caſe was, That although the certainty may appear to the Jury, yet that is not enough, for they ought to give judgment, *& oportet quod certa res deducatur in judicium.* And they agreed, that if they had found him guilty of a Room, it had been good, and ſo the Caſes on the Acre of Land, and of the third part of a Manor is good, for thoſe are ſufficiently certain, for of them the Law takes notice. The Opinion of *Crawley*, wherefore the verdict ſhould be good, was, becauſe the demand here was certain, although the Jury found it in *tanto*, &c. And where there may be certain deſcription for the Jury it is good enough, and the rather becauſe the Verdict is the finding of lay gents: and he compared it to the caſe of the Gate-houſe aforeſaid: but he agreed, that if the Writ of *Ejectione firme* had been brought *de tanto unius meſſuagii, &c. quod ſtat ſuper ripam*, that it would not have been good, but the Verdict is good for the reaſon aforeſaid. But Juſtice *Reeve* ſaid, that that which is naught in the demand, is naught in the Verdict, and therefore naught in the judgment, and therefore the Court would not give judgment, and therefore a *Venire facias de novo* was prayed, and granted by the Court.

169. *Gouch* libelled againſt *Toll ex officio* in the Eccleſiaſti-

cal

cal Court for Incontinencie without a Citation or preſentment, and for that the Defendant was excommunicated; and *Gotbold* prayed a Prohibition, which was denied by *Crawley* and *Reeve* Juſtices (the others being abſent) and it was ſaid by *Reeve*, That where they proceed *ex officio* a Citation is not needful, but put caſe it were, yet they ſaid, that no Prohibition is to be granted as this caſe is, becauſe, that where the Eccleſiaſtical Court hath Juriſdiction, although they proceed erroneouſly, yet no Prohibition lieth, but the remedy is by way of Appeal, and there he ſhall recover good coſts: and it was ſaid by *Crawley*, That if the party be returned cited, and he is not cited, That an Action upon the caſe lieth.

170. A woman libelled in the Arches againſt another for calling of her *Jade*, and a Prohibition was prayed and granted, becauſe the words were not defamatory, and do not appertain unto them. And *Reeve* ſaid, that for Whore or Bawd no Prohibition would lie, but they doubted of Quean.

171. *Bacon* Serjeant prayed a Prohibition to the Court of Requeſts upon this ſuggeſtion, That one Executor ſued another to accompt there, and an Executor at the Common Law before the *Statute* of *Weſt.* 2. *cap.* 11. could not have an accompt for cauſe of privity, and now by that Statute they may have an accompt, but the ſame ought to be by Writ, and therefore no accompt lieth in the Court of Requeſts. Secondly, they have given damages where no damages ought to be given in an Accompt. And laſtly, they have ſequeſtred other Lands, which is againſt the Law; and for theſe reaſons he prayed a Prohibition. *Whitfield* Serjeant contrary.

1. It is clear that an accompt by Bill lieth for an Attorney in this Court, and ſo in the Kings Bench and Exchequer: and as to damages it is clear that in an accompt a man ſhall recover damages upon the ſecond judgment, but as to the ſequeſtration he could not ſay any thing, but further he ſaid, That

it was not an accompt but only a Bill of diſcovery againſt Truſtees, who went about to defeat an Infant, and upon the reading of the Bill in Court it appeared that the ſuit was meerly for the breach of a truſt, and for a confederacie and combination, which is meerly equitable. Wherefore a Prohibition was denied becauſe it was no accompt, but as to the Decree for ſequeſtring other Lands, the Prohibition was granted.

Trin. 17° Car. *in the Kings Bench.*

172. EAſte brought an Action upon the Caſe upon an *Aſſumpſit* againſt *Farmer*, becauſe that where the Plaintiff had ſold to the Defendant ſo much wood, the Defendant in conſideration thereof did aſſume and promiſe to pay ſo much money to the Plaintiff, and to carry away the wood before ſuch a day; the Defendant pleaded that he paid the money at the day aforeſaid, but as to the carrying of it away before the day, he pleaded *non aſſumpſit*, and the Jury found that he did not pay the money at the day, but as to the other they found that he did aſſume and promiſe as aforeſaid, and it was moved in Arreſt of judgment, that the finding of the Jury was naught, for being but one *Aſſumpſit*, and the ſame being an intire thing, it could not be apportioned, and therefore they ought to find the intire *Aſſumpſit* for the Plaintiff, or all againſt him. And the Court agreed all that, and awarded, that there ſhould be a Repleader; and the Chief Juſtice *Bramſton* ſaid, That for the reaſon given before the Defendants plea was not good, and therefore the Plaintiff might have demurred upon it, which he hath not done; and therefore they agreed, that the Verdict was naught for the reaſon aforeſaid.

173.

173. *Williams* was indicted at *Briſtow*, upon the Statute of 1 *Jac. cap.* 11. for having two wives, and upon not *Guilty*, pleaded, the Jury found a ſpecial Verdict, which was thus: That the ſaid *Williams* married one wife, and was afterwards divorced from her *cauſa adulterii*, and afterwards married the other, and if that were within the Proviſo of that Statute which provides for thoſe who are divorced, was the Queſtion. And it was reſolved without argument by *Bramſton* Chief Juſtice, and *Heath* Juſtice (the other being abſent) That it is within the Proviſo, for the Statute ſpeaks generally of Divorce, and it is a penal Law: and *Heath* ſaid, That by the Law of Holy Church the parties divorced *cauſa adulterii* might marry, but *pars rea* not without licence, and he cited the caſe of *Anne Porter* of late in the Kings Bench, who was divorced *cauſa ſævitiæ*, and afterwards married one *Rootes*, and upon an Indictment upon this Statute it was doubted and debated whether it were within the Proviſo of this Statute or not? but reſolved it was not, becauſe only a Divorce *à cohabitatione*, and a temporal ſeparation until the anger paſt, but the divorce here is *à vinculo matrimonii*.

174. One was choſen to be Clerk of a Pariſh-Church, and was put in and continued Clerk three or four years, but was never ſworn; and now a new Parſon put him out, and ſwore another in his place. *Keeling* and *Rolls* Serjeant prayed a Writ of Reſtitution, and compared the ſame to the Caſe of diſfranchiſement, where Reſtitution lieth. But *Bramſton* and *Heath* Juſtices (the other abſent) would not grant it. And the Chief Juſtice ſaid, that the Doctor had not power to ouſt him; for he ſaid that it is a temporal Office, with which the Parſon had not to do: and further, they conceived that the Clerk hath remedy at Law, wherefore they would not award a Writ of Reſtitution, but they ſaid, that if the Clerk was never ſworn they would award a *Mandat* to ſwear him, to which the Counſel aſſented.

Trin.

Trin. 17° Car. *in the Common Pleas.*

175. WHite exhibited a Bill in the Court of Requeſt againſt *Grubbe* for Money due upon account; upon which *Mallet* moved for a Prohibition, becauſe it's no other than in the nature of a debt upon account, of which a Court of Equity hath no Juriſdiction, for by ſuch means the King ſhould loſe his Fine, the Defendant ſhould be put to another Anſwer upon his Oath, and which is above all, they would refer the merits of the Cauſe to others, and according to their Certificates make a Decree, ſo that by this means they would create Courts of Equity without number. Serjeant *Clark* contrary againſt the Prohibition, for he ſaid the Defendant had exhibited a Croſs Bill, and ſo had affirmed the Juriſdiction, and he ought to have demurred to the Juriſdiction; and he ſaid that where parties aſſent to a Decree, there the Kings Bench will not grant a Prohibition. For he ſaid, that by the ſame reaſon that a man may chuſe Arbitrators, he may elect his Judges; and further, he ſaid that the ſuit was for moneys due for divers things delivered by the Plaintiff being a Chandler in a Country-town, which he ought to prove to be delivered, and he had no proof: but *Crawley* and *Reeve* Juſtices, the others being abſent, granted a Prohibition, becauſe it is no other but an Action of debt upon account; and *Crawley* ſaid, that the particulars are out of doors by the account, & in debt brought, it is ſufficient to ſay, that the Defendant was indebted to him for divers Commodities. And they accounted, and upon the account the defendant was found to be in debt to him ſuch a ſum, &c. And note, it was ſaid in the Bill that the Plaintiff had no Witneſſes to prove the delivery of the things aforeſaid, and notwithſtanding they granted a Prohibition. for they ſaid, there is no remedy in the Court of Requeſts if you have no proof.

But

But is was ſaid that the Defendant in the Court of Requeſts had confeſſed the delivery of the things in his anſwer there. For which cauſe the Judges ſaid, that this confeſſion there might be given in evidence againſt him at Law.

176. Three covenanted joyntly and ſeverally with two ſeverally, and afterwards one of the Covenanters married with one of the Covenantees: by Serjeant *Mallet* the Covenant is gone; beſides, a man cannot covenant with two ſeverally, as a man cannot bind himſelf to two ſeverally. Further, they joyned in in Action where the covenant is ſeveral, that which they ſhould not do. *Crawley* and *Reeve* Juſtices did conceive that a man might covenant with two ſeverally, becauſe that it differs from the caſe of a Bond, for a covenant ſounds only in damages, but they conceived clearly that they ought not to joyn in action, and it was adjourned.

177. It was ſaid in a Caſe at the Bar by Sergeant *Godbold* that it was a Rule in the Kings Bench, That although an Atturney be dead, yet the Warrant of Atturney might be filed, which was not denied by the Court here.

Lawſon *and* Cookes *Caſe*.

178. IN a ſecond deliverance, which was entred *Hill.* 16 *Car. Rot.* 1530. the Caſe was thus: A man had a Rent-charge in Fee, and for Arrerages thereof, did diſtrain, & then granted the ſame over. And the Queſtion here was, Whether he ought to avow or juſtifie; and the doubt reſted upon this, *viz.* Whether the arrerages be gone by the grant of the rent, notwithſtanding the diſtreſs before taken, or not. By Serjeant *Callis* the arrerages are loſt, for without queſtion he cannot have debt. And he cannot avow, for that depends upon the inheritance which is gone by the grant, 4 *Rep.* 5. *Ognels* caſe, & 19 *H.* 6. 42. *b. Acc.* And here he hath avowed and not juſtified, as he ought

ought for to excuſe himſelf of damages, and therefore it is naught. But he took this difference betwixt the Act of God, and the Act of the party, as here it is; where it is by the Act of God, as where there is grantee for anothers life of a rent, and *ceſtuy qui vie* dieth, or where a man hath rent in the right of his wife and ſhe dieth, in thoſe caſes the arrerages ſhall not be loſt: But where a man grants over the rent as in our Caſe which is his own Act, there the arrerages are loſt. *Inſtitut.* 285. A man intitled to waſte accepts of a ſurrender, it deſtroys his Action, otherwiſe where it is by act of Law. So if a man bring debt for twenty pounds, and afterwards accepts ten pounds, that ſhall abate the Writ, becauſe that it is his own Act; and this difference may be collected out of the book of 19 *H.* 6. Beſides, until avowry it doth not appear upon Record for what the diſtreſs is taken, whether for rent, or for damage feaſant. Serjeant *Godbold* contrary, that he ought to avow, becauſe the rent in this caſe is not gone; and he ſaid, there was a difference between this Caſe and *Ognels* caſe, for there was no diſtreſs taken before the rent granted, as here is; and there the privity is gone, and the diſtreſs follows the rent, but here we have a pledge for the rent which is the diſtreſs, and return of the cattle if it be found for us, 19 *H.* 6. 41. *a.* Where the diſtreſs was lawfully taken at the beginning, there we may avow, and it is good to intitle us to a return, 22 *E.* 4. 36. Where there is a duty at the time of the diſtreſs, there he ſhall always avow and not juſtifie, and at leaſt it turns the Avowry into a Juſtification in our Caſe, ſo as you ſhall not make us Treſpaſſers, but that we may well juſtifie to ſave our damages. *Crawley* Juſtice: that the Avowry is turned into a Juſtification, and that there is ſufficient ſubſtance in the Plea to anſwer the unjuſt taking the diſtreſs. Juſtice *Reeve*: that it is good by way of Avowry, for the diſtreſs being lawfully taken at the time, it ſhall not take away his avowry, & therefore he ſhall have Retorn, for that was as a gage for the rent, and therefore differs from the other Caſes. Juſtice *Foſter* put this Caſe at the Common Law: Diſtreſs was taken, and before avowry Tenant for life died, Whether he ſhall avow or juſtifie.

But

But all agreed, that at the leaſt the Avowry is turned into a Juſtification, but it was adjourned.

179. The Court demanded of the Protonotaries, Whether a man might make a new aſſignment to a ſpecial Bar; and they ſaid no, but to a common Bar only, *viz.* that the Treſpaſs (if any were) was in *Bl.* Acre, there ought to be a new aſſignment by the Plaintiff: but *Reeve* and *Crawley* Juſtices (the other being abſent) held clearly, that the Plaintiff might make a new aſſignment to a ſpecial Bar; and further they ſaid, that the Plaintiff if he would might triſe the Defendant upon his Plea, but we will not ſuffer him to do ſo, becauſe that his Plea is meerly to make the Plaintiff to ſhew the place certain in his Replication in which the Treſpaſs was done.

180. The Diſſeiſee levieth a Fine; by *Reeve* and *Crawley*, Juſtices, it ſhall not give right to the Diſſeiſor, becauſe that this Fine ſhall enure only by way of Eſtoppel, and Eſtoppels bind only privies to them and not a ſtranger, and therefore the Diſſeiſor here ſhall not take benefit of it, and therefore they did conceive the 2 *Rep.* 56. a. to be no Law, *Vid.* 3 *Rep.* 90. a *&* 6 *Rep.* 70. a.

181. Serjeant *Callis* prayed a Prohibition to the Court of Requeſts for cauſe of priority of Suit, but by *Foſter* and *Crawley* Juſtices (the other being abſent) priority of Suit was nothing, the Bill being exhibited there before Judgment given in this Court.

182. The Caſe of *White* and *Grubbe* before being moved again, it was ſaid in this caſe by *Reeve* and *Foſter* Juſtices, that where a man is indebted unto another for divers wares, and the debt is ſuperannuated according to the Statute of 21 *Jac.*

cap. 16. and afterwards they account together, and the party found to be indebted unto the other party, in ſo much mony for ſuch wares, in that Caſe although that the party were without remedy before, yet now he may have debt upon accompt, becauſe that now he is not bound to ſhew the particulars, but it is ſufficient to ſay, that the Defendant was indebted to the Plaintiff upon accompt, *pro diverſis mercimoniis, &c.*

183. A Prohibition was prayed unto the Council of the Marches of *Wales*, and the Caſe was thus: A man being poſſeſſed of certain goods, deviſed them by his will unto his wife for her life, and after her deceaſe to *J. S.* and died. *J. S.* in the life of the wife did commence Suit in the Court of Equity, there to ſecure his Intereſt in Remainder, and thereupon this Prohibition was prayed. And the Juſtices, *viz. Banks* Chief Juſtice, *Crawley*, *Foſter* (*Reeve* being abſent) upon conſideration of the point before them, did grant a Prohibition, and the reaſon was becauſe the deviſe in the remainder of goods was void, and therefore no remedy in equity, for *Æquitas ſequitur legem*. And the Chief Juſtice took the difference, as is in 37 *H.* 6. 30. *Br. Deviſe* 13. and *Com. Welkden & Elkingtons* Caſe, betwixt the deviſe of the uſe and occupation of goods, and the deviſe of goods themſelves. For where the goods themſelves are deviſed, there can be no Remainder over; otherwiſe, where the uſe or occupation only is deviſed. It is true that heir looms ſhall deſcend, but that is by cuſtome and continuance of them, and alſo it is true that the deviſe of the uſe and occupation of Land is a deviſe of the land it ſelf, but not ſo in caſe of goods, for one may have the occupation of the goods, and another the Intereſt, and ſo it is where a man pawns goods and the like: For which cauſe the Court all agreed that a Prohibition ſhould be awarded.

Trin. 17° Car. *in the Kings Bench.*

184. A Man was ſued in *London* according to the cuſtom there, for calling a woman *Whore*, upon which a *Habeas corpus* was brought in this Court; and notwithſtanding *Oxfords* caſe in the 4 *Rep.* 18.a. which is againſt it, a *Procedendo* was granted: and it was ſaid by Serjeant *Pheaſant* who was for the *Procedendo*, and ſo agreed by *Bramſton* Chief Juſtice and Juſtice *Mallet*, That of late times there have been many *Procedendo's* granted in the like caſe in this Court.

185. An Orphan of *London* did exhibite a Bill in the Court of Requeſts againſt another for diſcovery of part of his eſtate. And Serjeant *Pheaſant* of Counſel with the Defendant came into this Court and Prayed a Prohibition, upon the cuſtom of *London*, That Orphans ought to ſue in the Court of Orphans in *London*: but the whole Court which were then preſent, *viz.* Chief Juſtice *Bramſton*, *Heath* and *Mallet* Juſtices were againſt it, becauſe that although the Orphan had the Priviledge to ſue there, yet if he conceive it more ſecure and better for him to ſue in the Court of Requeſts, then he may waive his priviledge of ſuing in the Court of Orphans, and ſue in the Court of Requeſts; for *quilibet poteſt renunciare juri pro ſe introducto &c.* and *Heath* ſaid, that he always conceived the Law againſt the Caſe of Orphans, 5 *Rep.* 73.*b.* But which is ſtronger in this Caſe, the Court of Orphans did conſent to the Suit in the Court of Requeſts; and therefore there is no reaſon that the Defendant ſhould compel the Infant to ſue there, wherefore they would not grant a Prohi-

bition, but gave day until *Mich. Term* to the Defendants Counſel to ſpeak further to the matter if they could.

Trin. 17° Car. *in the Common Pleas.*

Dewel *againſt* Maſon.

186. IN an Action upon the Caſe upon an Award, the caſe was this: The Award was that the Defendant ſhould pay to the Plaintiff eight pound, or three pound and Coſts of ſuit in an Action of Treſpaſs betwixt the Plaintiff and Defendant, as appears by a note under the Plaintiffs Attorneys hand, *ad libitum defendentis*, &c. And the Plaintiff doth not aver that a note was delivered by the Attorney of the Plaintiff to the Defendant; and the Defendant pleaded *Non aſſumpſit*, and it was found for the Plaintiff, and it was moved in arreſt of Judgment for the reaſon given before: *Rolls* contrary, that there needs no averment, and he ſaid it was *Wilmots* caſe adjudged in this Court, *Hill.* 15 *Car.* where the Caſe was, that the Defendant ſhould pay to the Plaintiff ſuch coſts as ſhall be delivered by note of the Attorneys hand: and it was here adjudged that there needs no averment, becauſe it was to be done by a ſtranger, but otherwiſe it had been, if it had been to be done by the Plaintiff himſelf: and by the Juſtices, the only queſtion here is, Whether the Attorney ſhall be taken for a ſtranger or not? Juſtice *Foſter*: that the Defendant ought firſt to make his election; which is, to pay either the eight pound which is certain, or the coſts which ſhall be delivered by a note of the Attorney. Beſides, here the Attorney is a ſtranger, becauſe the ſuit is ended, and to the Defendant he is totally a ſtranger, and therefore he ought to ſeek him to have the note delivered to him. But notwithſtanding he did conceive that as this Caſe is, Judgment ought to be ſtayed, becauſe the Plaintiff hath not well entitled himſelf to the Action, becauſe he hath

not

not averred that there were coſts expended in ſuch a ſuit: and in the Caſe cited by *Rolls*, the Plaintiff did aver the coſts incertain. Juſtice *Crawley*: it is without queſtion, the Defendant hath Election in this caſe; but as this Caſe is, he ought to have notice: and if the Caſe had been ſuch, that the Plaintiff himſelf had been to have delivered the note, then without queſtion there ought to be notice, and here the Attorney is no ſtranger, but is a ſervant to the Plaintiff, as every Attorney is. And I conceive, that if the Caſe had been that the Plaintiffs ſervant had been to deliver ſuch a note, that there notice ought to be given: And for want thereof, in this Caſe I conceive that the Judgment ought to be ſtayed. *Bankes* Chief Juſtice: I doubt upon the different Opinions of my Brethren, whether Judgment ought to be ſtayed or not. I agree that the Defendant hath Election in this Caſe; and further, I agree that where a thing is to be done by the Plaintiff or Defendant himſelf, there notice ought to be given; but otherwiſe, in Caſe of a ſtranger, and upon this difference ſtands our Books: as 10 *H.* 7. and all our Books: but the Queſtion here is, Whether the Attorney be a ſtranger or not? and I conceive that it is not in the power of the Plaintiff to compel him to bring the note, and is all one as a ſtranger, and therefore the Defendant ought to ſeek the Attorney to deliver this unto him: but the Caſe was adjourned, becauſe Juſtice *Reeve* was not preſent in Court.

187. *A.* ſaid to *B. Thou haſt killed my Brother*: for which *B.* ought an Action upon the Caſe; and by Serjeant *Whitfield* it will not lie, becauſe it is not averred that the Brother of the Defendant was dead at the time, and if he were not dead, then it is no ſlander, becauſe the Plaintiff is not in danger for it, 4 *Rep.* 16. a. *Snaggs* Caſe, *Acc.* Serjeant *Evers* contrary, becauſe the words imply that he is dead, and beſides, in the (*Innuendo*) it is alſo ſhewed that he was dead, for that is the *innuendo C. &c. fratrem nuper mortuum*: But by the whole Court the words are not actionable without aver-

ment

verment that he was dead, and the *Innuendo* doth not help it, *Hobarts Rep. p.* 8. *Miles* and *Jacobs* Case, *acc.*

188. A *Frenchman* had his Ship taken by a *Dunkirk* upon the Sea, and before that it was brought *infra præsidia* of the King of *Spain*, it was driven by a contrary wind to *Waymouth*; and there the *Dunkirk* sold the Ship and Goods to a Lord in *Waymouth*: whereupon the *Frenchman* having notice of his ship and goods to be there, libelled in the Admiralty *pro interesse suo*, against the Lord the Vendee of the Ship, shewing that it was taken by Piracie and not by Letters of Mart, as was pretended, and thereupon a Prohibition was prayed, and by *Foster* a Prohibition ought to be granted, for whether the *Dunkirk* took it by Letters of Mart or as a Pirate, it is not material, the sale being upon the Land and *infra corpus comitatus*; and so he said it was adjudged in such a case, for whether the sale were good or not, *Non constat* Justice *Crawley* conceived it should be hard that the sale being void, if it were taken as a Pirate, or by Letters of Mart, not being brought *infra præsidia* of the King of *Spain*, that by this means you should take away the Jurisdiction of the Admiralty, but he said he did conceive it more fit for the *Frenchman* to have brought a Replevin, which he said lieth of a Ship, or Trover and Conversion, and so have had the matter found specially. *Bankes* Chief Justice conceived that there should be a Prohibition, otherwise upon such pretence that it was not lawful prize, and by consequence the sale void, you would utterly take away the Jurisdiction of the Common Law. But because there was some misdemeanor in the Vendee, the Court would not award a Prohibition, but awarded that the buyer should have convenient time given him by the Court of Admiralty to find out the seller to maintain his Title, and in the mean time that he give good caution in the Admiralty, that if it be found against him, that then he restore the ship with damages. But note, the Court did agree (Justice *Reeve* only absent) that if a ship be taken by Piracie, or if by Letters of Mart, and be not brought

brought *infra præſidia* of that King by whoſe ſubject it was taken, that it is no lawful prize, and the property not altered; and therefore the ſale void; and that was ſaid by the Proctor of the *Frenchman* to be the Law of the Admiralty.

Rudſton *and* Yates *Caſe.*

189. RUDSTON brought an Action of debt upon an Obligation againſt *Yates* for not performance of an Award according to the Condition of the Bond: the Defendant pleaded that the Arbitrators *Non fecerunt arbitrium*, upon which they were at iſſue, and found for the Plaintiff; and it was now moved in arreſt of Judgment by *Trevor*, that the Defendant was an Infant, and therefore that the ſubmiſſion was void, and by conſequence the Bond which did depend upon it: and he conceived the ſubmiſſion void, Firſt, becauſe it is a Contract, and an Infant cannot contract: and he took a difference betwixt acts done which are *ex proviſione legis*, and acts done *ex proviſione* of the Infant; an Infant may bind himſelf for his diet, ſchooling and neceſſary apparel, for that is the proviſion of the Law for his maintenance; but a Bond for other matters, or Contracts of other nature which are of his own proviſion, thoſe he cannot do. Secondly, an Arbitrator is a Judge; and if an Infant ſhould be permitted to make an Arbitrator, he ſhould make a Judge, who by the Law is not permitted to make an Attorny, which were againſt reaſon. Thirdly, it is againſt the nature of a Contract, which muſt be reciprocally binding; here the Infant ſhould not be bound, and the man of full age ſhould be, which ſhould be a great miſchief. And where it is objected, it may be for his benefit: To that he anſwered, that the Law will not leave that to him to judge what ſhall be for his benefit, what not: and to this purpoſe amongſt other he cited it to be adjudged, That where an Infant took a ſhop for his trading, rendring rent, and in debt brought for the rent the Infant pleaded his Infancie, the other replied that it was for his benefit and livelihood,

hood, and yet it was adjudged for the Infant. *vid.* 13 *H.* 4. 12. & 10 *H.* 6. 14. Books in the point, and therefore he prayed that Judgment might be ſtayed. *Bramſton*. *Heath* and *Mallet* Juſtices (*Barckley* being then impeached for High Treaſon by the Parliament) were clear of Opinion, That the ſubmiſſion by an Infant was void; and they all agreed, That if the Infant was not bound, that the man of full age ſhould not be bound; ſo that it ſhould be either totally good, or totally void. But *Ward* who was of Counſel with the Plaintiff ſaid, that the caſe was not that the infant ſubmitted himſelf to the award, but that a man of full age bound himſelf, that the Infant ſhould perform the Award, which was ſaid by the Court quite to alter the Caſe. To that *Trevor* ſaid, that the caſe is all one; for there cannot be an Award if there be not firſt a ſubmiſſion: and then the ſubmiſſion being void, the Award will be void, and ſo by conſequence the Bond: and to prove it, he cited 10 *Rep.* 171. *b.* where it was adjudged that the non-performance of a void Award did not forfeit the Bond, and many other Caſes to that purpoſe. And the Court agreed, That if the Condition of a Bond recite, that where an Infant hath ſubmitted himſelf to an Award, that the Defendant doth bind himſelf that the Infant ſhall perform it, that the ſame makes the Bond void, becauſe the ſubmiſſion being void, all is void, and therefore day was given to view the Record.

190. *A.* and *B.* are indicted for murder: *B.* flies, and *A.* brings *a Certiorare* to remove the Indictment into the Kings Bench; Whether the whole Record be removed, or but part? *Keeling* the younger ſaid, that all is removed, and that there cannot be a Tranſcript in this Caſe, becauſe he ſaid the Writ ſaith, *Recordum & proceſſus cum omnibus ea tangentibus*: but the Chief Juſtice doubted of it, and he ſaid that the Opinion of *Markham* in one of our Books is againſt it; and he ſaid it ſhould be a miſchievous caſe if it ſhould be ſo, for ſo the other might be attainted here by Outlawry who knew not of it; and note, that *Bramſton* Chief Juſtice ſaid, That the Clerk of

of the Aſſiſes might bring in the Indictment *propriis manibus* if he would without a *Certiorare*.

190. A man was outlawed for Murder, and died: his Adminiſtrator brought a Writ of Error to reverſe the Outlawry, and it was prayed that he might appear by Atturney, and by *Bramſton* Chief Juſtice and Juſtice *Mallet* (none other being then in Court) it was granted that he might, for they ſaid that the reaſon wherefore the party himſelf was bound to appear in proper perſon is, that he may ſtand *rectus in Curia*, and that he may anſwer to the matter in fact; which reaſon fails in this caſe, and therefore the Adminiſtrator may Appear by Attorney.

191. One ſaid of Mr. *Hawes* theſe words, *viz.* *My Cozen Hawes hath ſpoken againſt the Book of Common Prayer; and ſaid it is not fit to be read in the Church:* upon which *Hawes* brought an Action upon the caſe, and ſhewed how that he was cited into the Eccleſiaſtical Court by the Defendant, and had paid ſeveral ſums, *&c.* The Defendant denied the ſpeaking of theſe words: upon which they were at iſſue, and it was found for the Plaintiff; and now it was moved by *Keeling* for ſtay of Judgment, That the words are not Actionable; as to ſay, A man hath ſpoken againſt a penal Law, which doth not inflict puniſhment of life and member, will not bear Action; and the puniſhment which is inflicted by the Statute of 1 *Eliz. cap.* 2. is pecuniary only and not corporal; but in default of payment of the ſum, that he ſhall be impriſoned for ſuch a time, which meerly depends upon the non-payment, and is incertain: And by the ſame reaſon he ſaid, to ſay of a man, that he hath not Bowe and Arrows in his houſe, or not a Gun: or to ſay of a man, That he hath ſpoken againſt any penal Law whatſoever, would bear Action, which ſhould be unreaſonable: wherefore he prayed that Judgment might be ſtayed. *Brown* contrary; the words are

actionable, becauſe that if it was true that he ſpoke them, he ſubjected himſelf to impriſonment by the Statute of 1 *Eliz.* although not directly, yet in default of payment; ſo as there might be corporal damage: and to prove it, he cited *Anne Davies* Caſe 4 *Rep.* 17. a. where it is ſaid, that to ſay that a woman hath a Baſtard will bear Action, becauſe that if it were true, ſhe was puniſhable by the Statute of 18 *Eliz.* Further, he ſaid, that if the words are not Actionable, yet the Action will lie for the ſpecial damage, which the Plaintiff hath ſuffered in the Eccleſiaſtical Court. Juſtice *Mallet*: the words of themſelves are not Actionable, becauſe that the corporal puniſhment given by the Statute doth depend upon the non-payment, and is not abſolute of it ſelf; but the Action will lie for the temporal damage, and therefore he conceived that the Plaintiff ought to have Judgment. Juſtice *Heath*: that the Plaintiff ought to have Judgment for the pecuniary Mulct is a good cauſe of Action, there being in default of payment, a corporal puniſhment given. But here is not only *injuria*, but *damnum* alſo, which are the foundations of the Action upon the Caſe: and if the words of themſelves be not Actionable, yet the Action will lie for the damage that the Plaintiff here ſuffered by the citation in the ſpiritual Court. *Bramſton* Chief Juſtice doubted it, and he conceived it hard that the words ſhould bear Action, becauſe as he ſaid the corporal puniſhment doth meerly depend upon the not payment: and upon the ſame reaſon, words upon every penal Law ſhould bear Action; and therefore this being a leading Caſe, he took time to conſider of it. It was ſaid, To ſay of a man, that he had received a Romiſh Prieſt, was adjudged Actionable, and that was agreed, becauſe it is Felony. At another day the Caſe was moved again, and Juſtice *Mallet* was of the ſame Opinion as before, *viz.* That the words themſelves were not actionable, but for the ſpecial damage that the Action would lie; and he ſaid, that one ſaid of another, *That he was a Recuſant*; for which an Action was brought in the Common Pleas, and he conceived the Action would not lie. Juſtice *Heath* was of the ſame Opinion as before, that the words of themſelves would bear Action, and he con-

conceived, That if a man ſpeak ſuch words of another, that if they were true, would make him liable to a pecuniary, or corporal puniſhment, that they would bear an Action, and here the Plaintiff was endamaged, and therefore without queſtion they will bear an Action. *Bramſton* Chief Juſtice, as before alſo, That the words are not Actionable, neither of themſelves, nor for the damage; not of themſelves, for no words which ſubject a man to a pecuniary Mulct if they were true, either at the Common Law, or by the Statute, will bear an Action. For by the ſame reaſon, to ſay that a man hath erected a Cottage, or to ſay that a man hath committed a Riot, would bear Action, 37 *Eliz.* in the *Common Pleas*. One ſaid of another, *That he did aſſault me, and took away my Purſe from me*; and upon *Not Guilty* pleaded, it was found for the Plaintiff, and Judgment was ſtayed, becauſe he might take his purſe from him, and yet be but a Treſpaſſer: So as it appeareth that words ought to have a favourable conſtruction, to avoid multiplicity of Suits: and if theſe words would bear an Action, by the ſame reaſon words ſpoken againſt every penal Law ſhould bear Action, which againſt the reaſon given before ſhould be a means to increaſe Suits. And he took it for a rule, If the words import ſcandal of themſelves, by which damage may accrue, then the words will bear action without damage, otherwiſe not, and therefore the damage here ſhall not make the words Actionable which of themſelves are not actionable, as I conceive they are not. Beſides, by this means the Act of a third perſon ſhould prejudice me, which is againſt reaſon, as here the Act of the Ordinary by the Citation and damage thereupon accrued, which perhaps might be *ex officio* only, for which cauſe he conceived that Judgment ſhould be ſtayed, but becauſe there were two Judges againſt one, Judgment was given for the Plaintiff.

Mich. 17° *of the King, in the Common Pleas.*

192. BAine brought an Action upon the Caſe againſt --- for theſe words, *viz. That he kept a falſe Buſhel, by which*

he did cheat and coſen the poor; & he ſaid in his Declaration, That he was a Farmor of certain lands, and uſed to ſow thoſe lands, and to ſell the Corn growing on them, and thereby *per majorem partem* uſed to maintain himſelf and his family; and that thoſe words were ſpoken to certain perſons who uſed to buy of him, and that by reaſon of thoſe words, that he had loſt their cuſtom; the parties were at iſſue upon the words, and found for the Plaintiff, and it was moved by Serjeant *Gotbold* in arreſt of Judgment, that the words were not actionable, becauſe that the Plaintiff doth not alledge that he kept the falſe Buſhel, knowing the ſame to be a falſe Buſhel, for if he did not know it to be a falſe Buſhel, he was not puniſhable, and by conſequence no Action will lie; and compared it to the caſe, Where a man keeps a Dog that uſeth to worry ſheep, but he doth not know of it, no Action lieth againſt him for it: but yet notwithſtanding, *Bankes* chief Juſtice and *Crawley* were of Opinion, that the words were Actionable, for of neceſſity it ought to be taken that he kept the Buſhel knowingly, for otherwiſe it is no couſenage; and here being ſpecial damage alledged, which was the loſs of his cuſtom, as he had pleaded it, the maintenance of his livelihood, they hold the words clearly actionable, & gave Judgment accordingly. Note, the other Judges were in Parliament.

193. Doctor *Brownlow* brought an Action upon the caſe for words againſt ſpoken of him as a Phyſitian, which words were agreed to be Actionable, but yet Serjeant *Gotbold* conceived that although that the words were actionable, that the Plaintiff had not well intitled himſelf to his Action, becauſe although that he ſaid that he is *in Medicinis Doctor*, yet becauſe he doth not ſhew that he was licenſed by the Colledge of Phyſitians in *London*, or that he was a Graduate of the Univerſities according to the Statute of 14 *H.* 8. *cap.* 5. that therefore the action will not lie, ſee Doctor *Bounchams* caſe 8 *Rep.* 113. *a.* where he ſhewed the Statute aforeſaid, and pleaded it accordingly, that he was a Graduate of the Univerſity of *Cambridge*, wherefore he prayed that Judgment might

might be ſtayed. *Bankes* Chief Juſtice and *Crawley* doubted whether the Act were a general Act or not; for if it were a particular Act, he ought to have pleaded it; otherwiſe that they could not take notice of it; but upon reading of the Statute in Court, they agreed that it was a general Act, wherefore they gave day to the party to maintain his Plea.

194. By *Bankes* Chief Juſtice: upon an *Elegit* there needs no *Liberate*, otherwiſe upon a Statute: and note, the *Elegit* doth except *Averia Carucæ*.

Dye *and* Olives *Caſe*.

195. IN an Action of falſe Impriſonment, the Defendant ſhewed, that *London* hath a Court of Record by preſcription, and that the ſame was confirmed by Act of Parliament, and that he was one of the Serjeants of the Mace of that Court, and that he had a Warrant directed unto him out of that Court to arreſt the Plaintiff *pro quodam contemptu* committed to the Court for not paying twenty ſhillings to *K. B.* and that in purſuance of the command of the Court, he accordingly did arreſt the Plaintiff. *Maynard:* that the juſtification was not good, becauſe the Defendant doth not ſhew what the contempt was, nor in what Action, ſo as it might appear to the Court whether they had Juriſdiction or not: And if ſuch general Plea ſhould be tolerated, every Court would uſurp Juriſdiction, and every Officer would juſtifie, where the proceeding is *Coram non Judice* and void, and thereby the Officer liable to falſe Impriſonment, according to the caſe of the Marſhalſee in the 10 *Rep.* And here the pleading is incertain, that the Jury cannot try it: and he put the caſe of the Mayor of *Plymouth*. The Mayor hath Juriſdiction in Debt, and Treſpaſs is brought there, which is *Coram non Judice*. But in this Action the party is impriſoned *pro quodam contemptu*, ſhall this be a good Juſtification in a falſe impriſonment brought againſt the Officer? certainly no. Serjeant

Rol.

Rolls contrary, that the Plea was good, becauſe that the Defendant hath ſhewed that the Court was holden *ſecundum conſuetudinem*, and therefore it ſhall be intended that the contempt was committed in a Caſe within their Juriſdiction; and therefore he cited the 8 *Rep. Turners* Caſe, to which *Maynard* replied, that that doth not make it good, becauſe that iſſue cannot be taken upon it. At another day, the Judges gave their Opinions; Juſtice *Mallet*: That the Plea is not good, becauſe that it is too general, and *non conſtat* whether within their Juriſdiction or not: and where it was objected that he is a Miniſter of the Court, and ought to obey their commands, and therefore it ſhould go hard that he ſhould be puniſhed for it, he conceived that there is a difference betwixt an Officer of an inferiour Court which ouſts the Common Law of Juriſdiction, and one of the four Courts at *Weſtminſter*; for where an Officer juſtifies an Act done by the command of an Inferiour Court, he ought to ſhew preciſely that it was in a Caſe within their Juriſdiction; and he cited 20 *H.* 7. the Abbot of St. *Albans* caſe. Juſtice *Heath* contrary; the party is ſervant to the Court, and if he have done his duty, it ſhould be hard that he ſhould be puniſhed for it: and he agreed that there is a difference betwixt the Act of a Conſtable and a Juſtice of Peace, and the Act of a Servant of a Court, for the Servant ought to obey his Maſter; and although it be an inferiour Court, yet it is a Court of Record, and confirmed by Act of Parliament; and all that is confeſſed by the Demurrer. *Bramſton* Chief Juſtice: that the Plea is naught, becauſe that it is too general and incertain; true it is, that it is hard that the Officer ſhould be puniſhed in this caſe for his obedience to which he is bound, and it is as true that the Officer for doing of an act by the command of the Court, whether it be juſt or unjuſt, is excuſed, if it appear that the Court hath Juriſdiction: but here it doth not appear that the Court had Juriſdiction; and if the Court had not Juriſdiction, then it is clear that the Officer by obeying the Court when they have not Juriſdiction, doth ſubject himſelf to an Action of falſe impriſonment, as it is in the Caſe of the Marſhalſy in the 10 *Rep.* but it was adjorned, *&c.*

The

The Biſhop of Hereford *and* Okeleys *Caſe.*

196. THe Biſhop of *Hereford* brought a Writ of Error againſt *Okeley*, to reverſe a Judgment given in the Common Pleas: the point was briefly this. One under the age of twenty three years is preſented to a Benefice, Whether the Patron in this caſe ſhall have notice, or that lapſe otherwiſe ſhall not incur to the Biſhop, which is grounded upon the Statute of 13 *Eliz. cap.* 12. And upon debate by the Counſel of the Plaintiff in the Writ of Error, that which was ſaid being upon the general Law of notice, nothing moved the Court againſt the Judgment given in the Common Pleas upon ſolemn debate, as it was ſaid, and therefore they gave day to ſhew better matter, or elſe that Judgment ſhould be affirmed. The Reaſons of the Judgment in the Common Pleas were two. Firſt, upon the Proviſo of the Statute, which ſays, That no Lapſe ſhall incur upon any deprivation *ipſo facto* without notice. Second reaſon was upon the body of the Act; which is, That admiſſion, inſtitution, and induction ſhall be void, but ſpeaks nothing of preſentation; ſo as the preſentation remaining in force, the Patron ought to have notice, and that was ſaid was the principal reaſon upon which the Judgment was given: and upon the ſame reaſons the Court here, *viz. Mallet*, *Heath*, and *Bramſton* Juſtices, held clearly that the notice ought to be given, or otherwiſe that Lapſe ſhall not incur: but they agreed that if the Act had avoided the preſentation alſo, that in ſuch caſe the Patron ought to have taken notice at his peril, being an avoydance by Statute, if the Proviſo help it not.

Mich. 17° *of the King, in the Common Pleas.*

197. A Said of *B. that he kept falſe weights*; for which words *B.* brought an Action upon the caſe, & ſhewed how that he got his living by buying and ſelling, but did not ſhew of what profeſſion he was; and by all the Court, *viz. Foſter*, *Reeve*, *Crawley*, and *Bankes* in the Common Pleas, the Action will

will not lie. Firſt, becauſe he doth not ſhew of what Trade or profeſſion he was; and it is too general to ſay that he got his living by buying and ſelling. Secondly, becauſe although that he had ſhewed of what Trade he was, as that he was a Mercer, as in truth he was, that yet the words are not actionable, becauſe there is nothing ſhewed to be done with them, or that he uſed them: and it can be no ſcandal, if the words do not import an act done by the falſe weights, for he may keep them and yet not uſe them; and he may keep them that another do not uſe them; and the keeping of falſe weights is preſentable in Leet, if the party uſe them, otherwiſe not. And where one ſaid of another, *That he kept a falſe Buſhel, by which he did cheat and couſen the poor*; the ſame was adjudged actionable, that is, True; and differs from this caſe, for there he ſaid, he not only kept them, but uſed them, and cheated with them, but it is otherwiſe in our caſe: and this caſe was compared to *Hobart's Reports*, where one ſaid of another, *That he kept men which did rob upon the High-way*: and adjudged that the words were not actionable, for he might keep them and not know of it. *Bankes:* the action upon the caſe for words is to recover damages: and here it can be no damage. Firſt, becauſe he doth not ſhew of what profeſſion he was: and Secondly, becauſe although he had ſhewed it, yet the words will not bear Action: and Judgment was given againſt the Plaintiff.

198. It was moved by Serjeant *Wild*, That depoſitions taken in the Eccleſiaſtical Court might be given in evidence in a Trial in this Court; and the Court was againſt it, becauſe they were not taken in a Court of Record; and they ſaid, although the parties were dead, yet they ought not to be allowed; and by *Bankes* Chief Juſtice, no depoſitions ought to be allowed which are not taken in a Court of Record. and *Foſter* and *Reeve* were of Opinion, that although the parties would aſſent to it, yet they ought not to be given in evidence againſt the conſtant rule in ſuch caſe. *Crawley* contrary, for he

he ſaid, that a writing which by the Law is not Evidence, might be admitted as Evidence by the conſent of the parties.

200. A man was bound to keep a Pariſh harmleſs from a Baſtard-child, and for not performance thereof, the Obligee brought Debt upon the Bond: the Defendant pleaded that he had ſaved the Pariſh harmleſs, and did not ſhew how the Plaintiff replied, and ſhewed how that the Pariſh was warned before the Juſtices of Peace at the Seſſions of Peace, and was there ordered by Record to pay ſo much for the keeping of the childe; and becauſe the Defendant had not ſaved him harmleſs, *&c.* The Defendant pleaded *Nul tiel Record*, upon which the Plaintiff did demur. And here two things were reſolved: Firſt, that the Plea *Nul tiel Record* upon an Order at Seſſions of Peace is a good Plea, becauſe that an Order at the Seſſions of Peace is a Record. Secondly, that notwithſtanding Judgment ought to be given for the Plaintiff, becauſe the Defendants bar was not good, in that he hath pleaded in the affirmative that he hath ſaved the Pariſh harmleſs, and doth not ſhew how as he ought to have done: but he ought to have pleaded *non damnificatus*, and that had been good without any further ſhewing, which he hath not done, and therefore the Plea was not good; and it was agreed that the ſame was not helped by the Demurrer, becauſe the ſame was matter of ſubſtance, but the Plaintiff might take advantage of it notwithſtanding, and therefore Judgment was given for the Plaintiff.

201. In Debt Judgment was given againſt the principal, whereupon a *Scire facias* iſſued forth againſt the Bail, and Judgment upon *Nihil dicit* was given againſt them; whereupon a Writ of Error was brought, and Error aſſigned, that there was no warrant of Attorny filed for the Plaintiff; and upon debate whether the warrant of Attorny ought to be filed or no, the Court ſeemed to incline their opinion upon theſe differences, but gave not any Judgment. Firſt, where it may

appear to the Court, that there was a warrant of Attorny, and where not. If there was not any warrant of Attorny, there they cannot order the making of one; but if there was one, they conceived that they might order the filing of it. Second difference, Where the warrant wanting, were of the part of the Defendant, and where of the part of the Plaintiff, in the Writ of Error: if it be of the part of the Plaintiff, such a warrant of Attorney shall not be filed, because he shall not take advantage of his own wrong: the last thing was, where the Record by the laches of the Plaintiff in the Writ of Error is not certified in due time, there the warrant of Attorny shall be filed: And the Books cited to warrant these differences were, 2 *H.* 8. 28. 7 *H.* 4. 16. 2 *Eliz. Dyer* 180. 5 *Eliz. Dyer* 225. 1 & 2 *Phil. & Mar. Dyer* 105. 15 *Eliz. Dyer* 330. 20 *Eliz. Dyer* 363. and 6. *El. Dyer* 230. Note, that it was said by *Crawley*, That it is all one where there is no warrant of Attorney, and where there is; and he said, there are many Presidents accordingly, and that the same is holpen by the Statute of 8 *H.* 6. *cap.* 1, 2. But *Bankes* Chief Justice contrary, That it is not helped by the Statute of *H.* 6. and so it is resolved in the 8 *Rep.* 162. And he caused the Protonotaries to search Presidents, but yet he said they should not sway him against the printed Law, because they might pass *sub silentio*. And the Chief Justice observed also, that the same is not holpen by the Statute of 18 *Eliz.* for that helps the want of warrant of Attorny after Verdict only, and not upon *Nihil dicit*, as this case is, or upon wager of Law, or upon confession, or *non sum informatus*: And the Court said, That it shall be a mischievous case, that Attornies should be suffered to file their warrants of Attorny when they pleased; and therefore they gave warning, that none should be filed after the Term, and willed that the Statute of 18 *Eliz. cap.* 16. should be put in execution.

Mich.

Mich. 17° Car. *in the Kings Bench.*

202. A *Certiorare* was directed to the Commiſſioners of Sewers, who according to the Writ made a Certificate, to which Certificate divers exceptions were taken by *Saint-John* the Kings Sollicitor. Firſt, that it appeareth not by the Certificate, that the Commiſſion was under the Great Seal of *England*, as it ought to be by the Statute of 23 *H.* 8. *cap.* 5. Secondly, the Certificate doth not expreſs the names of the Jurors, nor ſhew that there were twelve ſworn, who made the preſentment, as by the Law it ought to be, but only *quod præſentatum fuit per Juratores*; ſo that there might be but two or three. Thirdly, it appears by the Certificate, that it was preſented by the Jury, That the Plaintiff ought to repair ſuch a Wall, but it is not ſhewed for what cauſe; either by reaſon of his Land, preſcription or otherwiſe. Fourthly, they preſent that there wants reparation, but doth not ſhew that it lies within the Level and Commiſſion. Fifthly, there was an Aſſeſment without a preſentment, contrary to the Statute, for it is preſented that ſuch a Wall wanted reparation, and the Commiſſioners aſſeſſed the Plaintiff for reparation of that Wall and another, for which there was no preſentment. Sixthly, the Tax was laid upon the perſon, whereas by the Statute it ought to be laid upon the Land. Seventhly, there was no notice given to the Plaintiff, which as he conceived ought to have been, by reaſon of the great penalty which follows for non-payment of the Aſſeſment: for by the Statute the Land ought to be ſold for want of payment. Theſe were the Principal exceptions taken by the Sollicitor. *Lane* the Princes Attorney took other exceptions. Firſt, becauſe they aſſeſs the Plaintiff upon information; for they ſaid that they were

credibly informed, that such a Wall wanted reparation, and that the Plaintiff ought for to repair it; whereas they ought to have done it upon presentment, and not upon information, or their private knowledge. Secondly, that they assessed the Plaintiff, and for not payment sold the distress, which by the Law they ought not to do, for that enables them only to distrein; and it was intended by the Statute, that a Replevin might be brought in the Case, for it gives Avowry or Justification of a distress taken by reason of the Commission of Sewers, and there ought to be a Replevin, otherwise no avowry; and if Sale of the distress should be suffered, then that priviledge given by the Parliament should be taken away, which is not reasonable: *Keeling* of the same side, and he said, that it was adjudged, *Pasch.* 14 *Car.* in this Court in *Hungers* case, That the certificate of the Commissioners was insufficient, because that it was not shewed that the Commission was under the Great Seal of *England*, as by the Statute it ought to be: and the Judges then in Court, *viz. Mallet*, *Heath* and *Bramston*, strongly inclined to many of the exceptions, but chiefly to that, that there wanted *virtute Literarum Patex*. But day was given to hear Counsel of the other side.

203. A man acknowledgeth a Statute, and afterwards grants a Rent-charge, the Statute is afterwards satisfied, Whether the grantee of the rent may distrein without suing a *Scire facias* was the Question, which was twice or thrice debated at the Bar; but because it was before that *Mallet* the puisne Judge was Judge, the Court gave order that it should be argued again.

Thornedike *against* Turpington *in the Common Pleas.*

204. IN Debt upon a Bond, the Defendant demanded *Oyer* of the Condition, and had it, which was, that the Defendant

fendant ſhould pay ſo much in a houſe of the Plaintiff at *Lincoln*. The Defendant pleaded payment at *Lincoln* aforeſaid, upon which they were at iſſue, and the *Venire facias* was *De Vicines civitatis Lincoln*, and found for the Plaintiff. And now it was moved in arreſt of Judgment, that it was a miſ-trial; becauſe the *Venire facias* ought to have been of the body of the County, and not of the City, which was alſo a County of it ſelf: but it was reſolved by the Judges, *viz. Foſter*, *Reeve*, and *Bankes* chief Juſtice, (Juſtice *Crawley* only againſt it) that the trial was good: and this reſolution was grounded upon the Book of 34 *H.* 6. 49 & 50. *pl.* 17. there being no authority in the Law (as was agreed) in point to this caſe, but the Caſe aforeſaid. And it was taken for a rule, that where it doth not appear upon the Record, that there is a more proper place for trial, than where the trial was, that there the trial is good: but here is not a more proper place. Further, the chief Juſtice ſaid, that it was not poſſible to be tried in the body of the County, becauſe that the payment was to be in the City; and he ſaid, it is true, that if a man ſpeak generally of the County of *Lincoln*, it ſhall be intended of the body of the County, and not the City, becauſe that the City is but derivative out of the County: and further he ſaid, that the Judges are bound to take notice of a County, not of a particular liberty: Yet it was reſolved here, becauſe the trial was in the moſt proper place, and could not be otherwiſe, that the *Venire facias* was well awarded, and the trial good. See the Book of 34 *H.* 6.

Bayly *againſt* Garford.

205. BAyly brought an Action of Debt upon a Bond againſt Garford executor of another: the Defendant pleaded *Non eſt factum* of the Teſtator, upon which a ſpecial Verdict was given, *viz.* That the Teſtator was bound in that Bond with two others joyntly and ſeverally, and that afterwards the Seals of the two others were eaten with mice and rats; and whether now that were the Bond of the Teſtator or not was the Queſtion: which the Jury referred to the Court, and it

it was now argued by Serjeant *Whitfield* for the Plaintiff, that the Obligation ſtood good againſt the Defendant, notwithſtanding the eating of the Seals of the two others: and his reaſon was, Becauſe that where three are bound joyntly and ſeverally, that is all one as if they had been ſeveral Obligations: for as when three are bound joyntly and ſeverally, there may be one *Precipe*, one Declaration, and one Execution againſt them all together; ſo when three are bounden joyntly and ſeverally, there may be ſeveral *Precipes*, ſeveral Declarations, and ſeveral Executions againſt them, ſo it is as it were ſeveral and diſtinct Obligations, and therefore the avoiding of part, is not the avoiding of the whole. Further, he put caſes where a Deed which is intire may be void in part, and good for the reſidue, 14 *H.* 8. 25 & 26. 9 *H.* 6. 15. and *Piggots Caſe*, 11 *Rep.* 27. Where it is reſolved that if ſome of the Covenants of an Indenture, or conditions of a Bond are againſt the Law, and ſome good and lawful, that in that caſe the covenants and conditions which are againſt the Law, are void *ab initio*, and the others ſhall ſtand good: and he cited the 5 *Rep.* 23. *Matthewſons Caſe*, as a ſtrong caſe to this purpoſe. But the Court ſaid, that that caſe of the 5 *Rep.* differed from this caſe: for there certain perſons covenant *ſeparatim*, and there the breaking of the Seal of one of the parties from the deed ſhall not avoid the whole deed, for it is as ſeveral deeds; but here they are bound joyntly and ſeverally, which altereth the caſe. Beſides, he ſaid the Book in 3 *H.* 7. 5. made not againſt it, for there it ſhall be taken that they were bound joyntly and not ſeverally as in this caſe; and he cited a Report in the point, which was *Trinit.* 2. *Jac.* in this Court betwixt *Banning* and *Symmonds*, where the Caſe was, That twenty eight Merchants were bound joyntly and ſeverally (as our caſe is) and three of their ſeals were broken from the deed, but notwithſtanding it was reſolved that the deed did remain good againſt the others (note, that the Court doubted of that Report, and therefore ordered that the Roll ſhould be ſearched) and the Objection here, that it is joynt, is worth nothing, becauſe it is ſeveral alſo; and he ſaid, that if two levy

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a Fine, one within age, and the other of full age, he ſaid it is good in part, and voidable in part; and if a Fine, which is a matter of Record, may be good in part and voidable in part, *à fortiori* he conceived a matter in fait, as a Bond: and the caſe of the Fine he ſaid was *Engliſhes* caſe adjudged: and he would have taken a difference betwixt Raſing, Interlineation and Addition, as is in *Piggots Caſe*, that the ſame ſhall avoid the whole deed. But that the breaking of the Seal of one ſhould not avoid it but for part. But the Court ſaid, That it was clearly all one, wherefore he prayed Judgment for the Plaintiff. Serjeant *Pheaſant* contrary, That the whole deed is avoided, and *non eſt factum* of the Defendant, it is not the ſame Bond in nature and effect as it was before, and as 5 *Rep.* 119. *Whelpdales Caſe*, is if the deed were altered by interlineation, addition, raſure and breaking of the Seal, there the Defendant may plead *non eſt factum*, becauſe it is not the ſame deed: ſo in this caſe it is not the ſame deed, for whereas it was joynt at the firſt, now if the deed ſhould ſtand good againſt the Defendant only, it ſhould be his Bond only, where it was his Bond, and the Bond of another at the firſt, and ſo not the ſame Bond; and 3 *H.* 7. 5. ought to be taken of a Bond joynt and ſeveral, becauſe that moſt Bonds are ſo, and then it is clear our very Caſe, and there it is reſolved, That if two be bounden in a Bond, and the Seal of one is diſſolved and taken from the Bond, that it avoids the whole deed, and it is not an Obligation joynt and ſeveral, but joynt or ſeveral at the Election of the Obligee, for he cannot uſe both; and when he hath by his own Act deprived himſelf of this Election (as in our Caſe) which goes in prejudice of the Obligor, who is the Defendant, the whole Bond is thereby gone, for by that means the Defendant only ſhall be charged, where both were; and therefore he conceived that if I grant unto a man an Annuity, or a robe, if the grantee releaſe one of them, both are gone, becauſe he hath deprived himſelf of Election: ſo this caſe: he by his default ſhould prejudice the defendant here, which ought not to be, & he compared this caſe to *Laughters caſe*, *C.* 5. *Rep.* 21. Beſides, if the whole deed ſhould not thereby be

be avoided, it ſhould be a great prejudice to the Defendant, in as much as if all happen to be in execution for the debt due upon that Bond, as by the Law they may, and the one eſcape, the ſame ſhould give advantage to the others to have *Audita querela*, and by that to diſcharge themſelves, which the Defendant here ſhould loſe, if the Obligation ſhould ſtand in force as to him only. 8 *Rep.* 136. Sir *John Needhams* caſe, If a woman Obligee taketh one of the Obligors to be her Huſband, the ſame is a diſcharge to the other. Two commit a treſpaſs, the diſcharge of one is the diſcharge of both, yet it is there joynt or ſeveral at the will of the party who releaſeth. But it may be objected, that it is a Caſual act here, and therefore ſhall not be ſo prejudicial to the Plaintiff here. To that he anſwered, That that ſhall not help him, becauſe it is his own lacheſs and default; and the ſame Objection might have been made in *Piggots* caſe, where the Obligation is altered in a material place by a ſtranger without the privity of the Obligee, and yet there it was reſolved that the ſame ſhall avoid the deed. Beſides, if the Obligee had delivered the ſame over to another to keep, and it had been eaten with Rats and Mice, yet that would not excuſe him, and by the ſame reaſon ſhall not help the Plaintiff here. *Matthewſons Caſe*, *C.* 5 *Rep.* differs much from this caſe, becauſe there the Covenants are ſeveral, and not joynt as in this Caſe, and therefore if the Covenantee doth releaſe to one of the covenanters, that ſhall not diſcharge the others. For the Caſes of 14 *H.* 8. and *Piggots Caſe* they differ much from our Caſe, for there the covenants or conditions againſt the Law are void *ab initio* by the conſtruction of the Law, and no alteration as in our caſe by the Act or default of the party by matter *ex poſt facto*, and therefore thoſe Covenants or Conditions againſt the Law cannot vitiate thoſe which were good and according to Law, becauſe they took not any effect at all. So if a Monk and another be bound, the Bond is void as to the Monk, and good as to the other, becauſe there is no ſubſequent alteration by the party; but the ſame is void by conſtruction of law *ab initio*: and upon the ſame reaſon ſtands the Caſe of the Fine

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put of the other ſide. For which cauſes he prayed Judgment for the Defendant. Note, the Court, *viz. Foſter, Reeve, Crawley* and *Bankes* Chief Juſtice did ſtrongly incline that Judgment ought to be given for the Defendant; and their reaſon was, That if the Obligee by his Act or own lacheſs diſcharge one of the Obligors, where they are joyntly and ſeverally bound, that the ſame diſcharges them all: but gave day for the further debating of the Caſe, for that this was the firſt time it was argued.

207. By Juſtice *Foſter* and *Bankes* Chief Juſtice, a Truſt is not within the Statute of 21 *Jac. cap.* 16. of *Limitations*; and therefore no lapſe of time ſhall take away remedy in Equity for it; but for other Actions which are within the Statute, and the time elapſed by the Statute, there is no remedy in Equity; and that (they ſaid) was always the difference taken by my Lord Keeper *Coventry*: but Juſtice *Crawley* ſaid, that he had conferred with the Lord Keeper, and that he told him that remedy in Equity was not taken away in other Actions within this Statute.

208. It was ſaid by the whole Court, that they never grant an Attachment without an *Affidavit* in writing.

209. The Caſe before of the warrant of Attorney, was betwixt *Firburne* and *Cruſe*, and was entred *Trinit.* 17 *Car.* And now it was reſolved upon reading of Preſidents in Court, that no warrant of Attorney ſhall be made or filed, becauſe that it is an error and not helped, being after judgment in *Nihil dicit*, & that none of the preſidents came to our caſe. The greateſt part of preſidents were theſe, *viz.* the firſt was 1 *Car. Taylor* againſt *Thellwell*, the ſame appeared to be upon demurrer, and no Judgment given. Another was *Mich.* 3 *Car. Peaſgrove* againſt *Brooke*, and in that Caſe it did not appear

pear that any Writ of Error was brought. Another was, *Paſch.* 5. *Car. Tayler* againſt *Sands*. Another *Hill.* 6 *Car. Smith* againſt *Bland*, in that it was conceived to be amendment only; and it was agreed for Law, that where there was a warrant of Attorney, it might be amended for any defect in it, as where there is a miſpriſion of the name or the like, as it is reſolved *Br.* amendment 85. and ſo is 1 and 2 *Phil.* and *Mar. Dyer* 105. *pl.* 6. expreſly, where *Alicia* for *Elizabetha* in the warrant of Attorney was amended; and that after a Writ of Error brought by conſtruction of the Statute of 8 *H.* 6. and ſo is 9 *E.* 4. *Br.* amendment 47. And Juſtice *Reeve* ſaid, it cannot appear to us by any of the ſaid Preſidents, whether there was a warrant of Attorney or not: and perhaps upon examination it might appear to the Judges that there was a warrant of Attorny, which is helped by the Statute of 8 *H.* 6. and that might be the reaſon which cauſed them to order that it ſhould be filed; but that doth not appear to us, and therefore the preſidents were not to the purpoſe. Beſides, it doth not appear by any of them whether judgment were given or not; and before judgment it may be amended, as the Book is, 9 *E.* 4. 14. *br.* amendment 47. Beſides, in one of them the Plaintiff did neglect to remove the Record, which is the very caſe in *Dyer*, and that was the reaſon that the warrant of Attorney was filed, but in this Caſe there appearing to be no warrant of Attorney it is not helped by the Statute of 8 *H.* 6. and after a Judgment, and that upon *Nihil dicit*, which is not holpen by the Statute of 18 *Eliz.* and there is no Lacheſs in removing of the Record by the Plaintiff, and for theſe reaſons the whole Court was againſt the Defendant in the Writ of Error, that it was Error, and therefore ought not to be amended. Note, that in this Caſe it was moved that the warrant of Attorney might be filed in this Court, after Error brought in the Kings Bench: but obſerve, that if it had been a thing amendable, that had been no impediment to it, for things amendable before Error brought, are amendable after, and if the interior Court do not amend them, the ſuperior may, and ſo it is adjudged 8 *Rep.* 162. in *Blackmores* caſe.

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and ſo is the Caſe expreſs in the point, 1 and 2 *Phil.* and *Mar. Dyer* 105. *pl.* 16. Where a warrant of Attorney was amended *in Banco* after Error brought and the Record certified. This is only my own obſervation upon the Caſe.

Mich. 17° Car. *in the Kings Bench.*

210. AN information was brought for the King againſt *Edgerley* Carrier of *Oxford*, becauſe that where by the cuſtom of *England* no Carrier or other perſon ought to carry above two thouſand weight, and that with a Waggon having but two wheels, and but four horſes, that the Defendant had uſed for the ſpace of a year laſt paſt to drive *Quoddam geſtatorium, Anglicè* a Drag or Waggon, *Cum quatuor rotis & cum inuſitato numero equorum, viz.* with twelve Horſes betwixt *Oxford* and *London* and he had uſed to carry with it five thouſand weight, ſo that he had digged and ſpoiled the way in a Lane called *Lobbe-Lane*, that the people could not paſs. To which the Defendant pleaded *Not Guilty*, and was found guilty by Verdict; and many exceptions were taken to the Information: all which were over ruled by the Court, *viz. Mallet* and *Heath* Juſtices, and *Bramſton* Chief Juſtice, to be miſpriſions: the firſt was, That he drave a Waggon *Cum inuſitato numero equorum*, and doth not ſhew the certain number of them, and therefore the Information which was in the nature of a Declaration was not good for the incertainty. But *per Curiam* the ſame was miſtaken, for it ſaith, that he drave with eleven horſes. The ſecond exception was, That the uſual weight which it ought to carry is not ſhewed; but that was ruled alſo to be a miſtake, for it ſaith 2000 weight. The third was, that it is not ſhewed in the Information that the way did lead to other Market-Towns than from *Oxford* to *London*; but it

was ruled to be good notwithſtanding that exception, becauſe that the place *à quo*, and the place *ad quem* is ſet down. And it is not material whether it lead to other towns or not. The fourth exception was, That the Nuſance is ſaid to be in a place called *Lobbe-Lane*, and it is not ſhewed of what quantity or extent that Lane is, *viz.* how many poles or the like: but it was ruled to be good, notwithſtanding that, Firſt, becauſe that the Jury have found that the way was ſtopt that the people could not paſs; and if it was ſo, then it's not material how long it was. Secondly, *Lobbe-Lane* is ſaid only for the certainty of the place, that the Viſne might come from it: for of neceſſity it will be a Nuſance through the whole way betwixt *Oxford* and *London*. And Laſtly, the Nuſance is laid to be through all *Lobbe-Lane*, and therefore it is good notwithſtanding that exceptson alſo. And therefore the matter and form of the Information being admitted good, then the Queſtion was, what Judgment ſhiould be given in this Caſe; whether that the Carrier ſhould repair it at his own coſts, or ſhould be fined for the Nuſance to the Commonwealth or not? Juſtice *Mallet*: there are ſeveral Judgments in Caſes of Nuſance; if it be an aſſiſe *quia levavit*, or *quia exaltavit*, it ought to be part of the Judgment, that the Defendant demoliſh it at his own coſts: ſo where a Nuſance is to a River, 19 *Aſſ. pl.* 6. But our Caſe differs much from the caſe of the River, for that is a High-way which leadeth to a Port to which all reſort, and therefore a ſtronger Caſe: but he conceived that the Judgment ſhould not be that he ſhould repair it, becauſe it is ſaid in the Information, that the Townſhip ought, and therefore it differs from thoſe Caſes: and he doubted whether he ſhould be fined or no, becauſe that the information is not *vi & armis*, and not againſt any Statute, for then it ſhould be a contempt, and ſo fineable: but notwithſtanding he agreed, that he ſhould be fined. Firſt, becauſe it is layed to be *Contra pacem Domini Regis*, & *ad nocumentum* of the Kings people, which is a contempt, and therefore fineable. Secondly, becauſe that although it is not laid to be *vi & armis*, yet it is laid to be a rooting and ſpoiling, which implieth force;

11 *Aſſ.*

11 *Aſſ.* & 19 *Aſſ.* 6. where a Nuſance was with force, there the Defendant was fined. Then admitting that the Defendant ſhall be fined; the Queſtion then is, What fine ſhall be ſet upon him? and he ſaid, that it ſhall be *Secundum quantitatem delicti, & ſalvo wainagio ſuo*, according to the Statute of *Magna Charta*, *cap.* 14. & *Weſt.* 2. So that we ought not to aſſeſs a Fine upon any Freeholder to take away his contenement; nor upon any Villain to take away his wainage; and he ſaid, that he conceived that the fine ſet upon him ought to be the leſs, for the great prejudice which might come to the Defendant, becauſe that the Townſhip might have an Action upon the Caſe againſt him, becauſe they are bound to repair it, and therefore he cited 27 *H.* 8. 27. Further, he took exception to it, that it is not ſhewed of what value or eſtate the Defendant is, ſo as we might know what fine to impoſe; for ſuch fine ought to be impoſed *Salvo wainagio ſuo* as aforeſaid: and he compared it to the Caſe in 4 *E* 4. 36. a Juror is demanded, and doth not appear, he ſhall be fined to the value of his eſtate for a year: but that ought to be enquired of by the Jury, and not ſet by the Court, becauſe they do not know the value of his eſtate, ſo in this Caſe: but notwithſtanding he agreed, that he ſhould be fined, becauſe it appeareth to us how great his fault was, and the fine ought to be as aforeſaid, and therefore he ſet a fine upon him of four Marks. Juſtice *Heath:* two things are here conſiderable, whether there ſhall be any Judgment as this Caſe is; and admitting that there ſhall, what Judgment ſhall be given; and he agreed that Judgment ſhould be given, becauſe that the Information is good, as well for the form as for the matter of it: it is good for the matter of it, becauſe *Malum in ſe & ad nocumentum publicum*, and therefore it is properly puniſhable in this Court, & the rather now, becauſe not puniſhable in another Court, the Star-Chamber being now taken away: and it is good for the form of it, for it hath ſufficient certainty, as is before ſhewed. Now for the judgment what ſhall be given, he agreed that he ſhould be fined and impriſoned, for impriſonment is incident to a fine, but he did not determine what the fine

fine ſhould be, he agreed the Rule that the fine ſhall be *ſecundum quantitatem delicti*, and that cannot be ſo little as it is made: for although *Lobbe-Lane* be layed in which the Nuſance ſhould be, that is only for neceſſity, that there may be a certain place for the Viſne, but of neceſſity the Nuſance is through the whole High-way betwixt *Oxford* and *London*. And becauſe we will not offend as the Star-chamber did by aſſeſſing too high fines, for which it was juſtly condemned; ſo upon the other ſide, we ought not to ſet ſo ſmall fines, that we injure Juſtice, and be thereby an occaſion to increaſe ſuch faults where we ought to ſuppreſs them: and therefore he conceived the fine ſet by *Mallet* too little; but he agreed, that the Judgment ſhould be fine and imprisonment; but he adjorned the ſetting of the fine, until he had conſulted with the Clerks, whether it ſhould be inquired of by Commiſſion, or other good information. *Bramſton* Chief Juſtice, that the Information is good for the matter and the form: but he objected, that where it is ſaid, that he did drive *quoddam geſtatorium*, that *geſtatorium* is a word incertain, and that therefore the Information ſhould be inſufficient; but he agreed that notwithſtanding that, that it was good by reaſon of the *Anglicè*, for that reduceth it to certainty; and he cited the Caſe betwixt *Sprigge* and *Rawlinſon*, *Paſch* 15 *Car.* in this Court; where the Caſe was, that a man brought an *Ejectione firme de uno repoſitorio*, which word was put for a Warehouſe, and reſolved that it was naught for the incertainty, but the Chief Juſtice here ſaid that it had been good if it had been explained by an *Anglicè*, and ſo he ſaid it was reſolved in that Caſe, and therefore he agreed that the Information here was good notwithſtanding that exception by reaſon of the *Anglicè*, this offence is an offence againſt the Commonwealth, and ſuch an offence for which a man may be indicted, for it is laid in the Information to be *ad nocumentum Ligeorum Domini Regis*, wherefore he agreed that the Judgment ſhould be a fine with *Capiatur*, and he ſaid, that it cannot be part of the Judgment in this Caſe, that the Defendant ſhould repair it, becauſe it is ſaid in the Information expreſly, that the

the Parishioners ought to repair it: and the Chief Justice said, (and so Justice *Heath* which I before omitted) that the Township cannot have their Actions, for so there should be multiplicity of Actions, which the Law will not suffer; but he conceived that if any man had a special and peculiar damage, then he might have his Action, otherwise not: as if a man were bound by prescription or tenure to repair that place called *Lobbe-Lane*, or any part of it, then he might have his action upon the Case against the defendant, otherwise not: he agreed that the fine should be *secundum quantitatem delicti* but yet not too high, because the other Parishes may have their Information in like manner against the Defendant, but he agreed to adjorn the setting of the fine.

Southward *against* Millard.

209. IN an *Ejectione firme*, the Defendant pleaded *Not Guilty*. Upon which a special Verdict was found. *Nicholls* possessed of a Term for 1000 years, devised the same to E. his daughter for life, the remainder to *John Holloway*, and made *Lowe* the Husband of the Daughter his Executor and died: *John Holloway* devised his interest to *Henry* and *George Holloway*, and made *Oliver* and others his Executors and died; afterwards *Lowe* spake these words: *If* E. *my wife were dead, my estate in the premisses were ended, and then it remains to the* Holloways. E. died, the Executors of *John Holloway* made the Lease to the Plaintiff, and *Lowe* made the Lease to the Defendant, who entred upon the Plaintiff, who brought *Ejectione firme*; and whether upon the whole matter the Defendant were guilty or not of the trespass and ejectment supposed, the Jury referred to the Court: and the points upon the Case are two. First, whether the words spoken by *Lowe* the Executor be a sufficient assent to the devise or not: admitting that it is, then the Second Point is, Whether the assent came in due time or not, as to the interest of *John Holloway* in the remainder, because he died before the words spoken which should make the assent; and as to that, the point is

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no other, but that the Legatee dieth before aſſent to the Legacie, whether aſſent afterwards came too late, or that the Legacie ſhall be thereby loſt or not, that is the Queſtion: and by Juſtice *Mallet*, it is a good aſſent, and that in due time, And here ſome things ought to be cleared in the Caſe: First, that the deviſe to *John Holloway* in the Remainder is good by way of executory deviſe. Secondly, that the deviſe by *John Holloway* to *Henry* and *George* is a void deviſe, becauſe but a poſſibility. Thirdly, that the aſſent to the firſt deviſe is an aſſent alſo to him in the remainder. And laſtly, that if an Executor enter generally, he is in as Executor and not as deviſee: all which are reſolved in *Lampetts* and in *Matthew Mannings* Caſe. Now theſe Caſes being admitted, the Queſtion is, Whether that *Lowe* the Executor here hath made a ſufficient Declaration, to take the Term as Deviſee in the right of his wife, or not: for he hath his Election to take it as executor, or in the right of his wife; and as I conceive he hath made a good Election to have it as Legatee in the right of his wife. The laſt words, *viz. That then it remains to the* Holloways, which is impoſſible by Law to be, becauſe that the deviſe to them was void, he did not waigh, becauſe but additional, and the firſt words of themſelves are ſufficient to make an aſſent, it is not a transferring of an Intereſt, but an aſſent only to it, which was given by the firſt Teſtator, and after aſſent, the deviſee is in by the firſt Teſtator, and that being but a perfecting Act like an Attornment, and admittance of a copy-holder, the Law always favours it, for the Law delights in perfection, and therefore an aſſent by one Executor ſhall binde all, ſo an aſſent by one Infant-Executor above 14 years ſhall binde the other, ſo an aſſent to the particular Tenant is good to him in the Remainder; Admittance of a Copyholder for life, is admittance of him in the remainder: which Caſes ſhew that an aſſent being but a perfecting act the Law ſhall always make a large conſtruction of it: and he ſaid, that *Mannings* caſe in the 8 *Rep.* is the very Caſe with our Caſe, as it appeareth in the pleading of it in the new Book of *Entries* 149. *b.* and alſo in *Mannings* Caſe aforeſaid, but that Caſe was not reſolved upon

upon that point, for the deviſe there was paying ſo much, and the deviſee being alſo executor payed the money, and therefore it was ruled to be a ſufficient aſſent to the Legacie, and therefore our caſe may be doubted notwithſtanding that caſe; and for my part I conceive it a good aſſent to the Legacie in our Caſe. And for the ſecond point, I hold that the aſſent comes in due time to ſettle the Remainder, although that *John Holloway* were dead before, for otherwiſe by this common caſualty of death, which may happen ſo ſuddenly that an aſſent cannot be had before, or by the wilful obſtinacie of the Executor, that he will not aſſent, Legatees ſhould be defeated of their Legacies, which would be a great inconvenience. Beſides, I hold that the deviſe by *John Holloway* was void, he having but a poſſibility at the time of the deviſe, and therefore that it remain to his Executors, and by conſequence, that the *Ejectione firme* brought by their Leſſee will lie. Juſtice *Heath* acc. for the Plaintiff: Three things are here conſiderable. Firſt, whether there need any aſſent at all of the Executor to a Legacie. Secondly, whether here be an aſſent or not. Thirdly, whether this aſſent come in due time or not. The firſt hath been granted, that there ought to be aſſent, for the great inconvenience which might happen to Executors if Legatees might be their own carvers, and ſo are all our Books except 2 *H.* 6. 16. and 27 *H.* 6, 7. which ſeem to take a difference; where the Legacie is given in certain and in *ſpecie*, there it may be taken without aſſent, but where it is not given in certain, there it cannot; but he held clearly the Law to be otherwiſe, that although it be given in certain, yet the Legatee cannot take it without aſſent of the Executor; for ſo the Executor ſhould be ſubject to a *Devaſtavit* without any fault in him, or any means to help himſelf, which ſhould be very inconvenient. Then the ſecond thing here to be conſidered is, Whether there be an aſſent or not: It is clear, that if an Executor enter generally, he ſhall be in as Executor, and not as Legatee, for that is beſt for him to prevent a *Devaſtavit*; and it is as clear, that if he declare his intention to be in as Legatee, that then he ſhall be ſo: then the Queſtion here is, Whe-

ther the words in our Caſe be a ſufficient declaration of the mind of the Executor to take the ſame as Legatee in the right of his wife or not: and I hold that it is. He agrees that the ſecond words are not ſo weighty as the firſt; but he held the firſt words are ſufficient of themſelves to make an aſſent: and when he ſaith, that then it remains to the *Holloways*, that proves that he took notice thereof as a Legacie, and that he would have it in that right, although in truth the deviſe by *John Holloway* was void, ſo as it could not remain to them. For the third, he held that the aſſent came in due time, otherwiſe it might be very prejudicial to Legatees, for elſe by that means they may be many times defeated of their Legacies: for put Caſe that an Executor will not aſſent, and the Legatee dieth before he can compel him to aſſent, or that the Legatee dieth in an inſtant after the deviſor, in the 5 *Rep. Princes* Caſe it is reſolved that an Infant under 17 may not aſſent to a Legacie, nor the adminiſtrator *Durante minori ætate*; then put caſe that the Legatees die during the adminiſtration, *durante minori ætate*, in whoſe time there cannot be an aſſent, It would be a very great miſchief, if that in any of theſe Caſes the Legatees ſhould be defeated of their Legacies, when by poſſibility they could not uſe any means to get them: wherefore he held clearly that the aſſent of the Executor after the death of the Legatee came in good time, and therefore he concluded for the Plaintiff. *Bramſton* Chief Juſtice alſo for the Plaintiff. For the firſt point, he held that there is a good aſſent; and he ſaid, that *Mannings* Caſe hath the very words which our Caſe hath, but my Lord *Cooke* did not ſpeak of theſe words in the Report of the Caſe, becauſe he conceived that the payment of the money was a ſufficient aſſent to the Legacie: but further I conceive, that it differs fully from *Mannings* Caſe, for there it is found expreſly, that the Executor had not Aſſets, and therefore it ſhould be hard to make him aſſent by implication, thereby to ſubject himſelf to a *Devaſtavit*; for as I conceive, an Executor ſhall never be made to aſſent by implication where it is found that he hath not Aſſets, but there ought to

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be an expreſs aſſent, by reaſon of the great prejudice which might come unto him, but in our Caſe it is not found that *Lowe* had not Aſſets: an Infant cannot aſſent without Aſſets; but if there be, then it ſhall bind him, and perhaps that was the reaſon that my Lord *Coke* did not report any thing of theſe words, whether they were an aſſent or not; and his paſſing over them without ſaying any thing of them, ſeems partly to grant and agree, that they did not amount to an aſſent. A man deviſeth unto his Executor paying ſo much, and he payeth it, it is a good aſſent to the Legacie; ſo is *Matthew Mannings* caſe 8 *Rep.* and *Plowden Comment. Weleden* and *Elkingtons* caſe: and he ſaid, that an aſſent is a perfecting act which the Law favours, and therefore he ſaid that it was adjudged, that where an Executor did contract with the deviſee for an aſſignment of the Term to him deviſed, that it was a good aſſent to the Legacie. For the ſecond point alſo he held clearly that the aſſent came in due time; for otherwiſe it ſhould be a great inconvenience, for by that means it ſhould be deſtructive to all Legacies; for of neceſſity there ought to be an aſſent of the Executor, and if he will not aſſent, and the Legatee dieth before he can compel him to aſſent, or if the Legatee dieth immediately after the Deviſor before any aſſent to the Legacie, in the firſt Caſe it ſhould be in the power of the Executor, who is a ſtranger, to prejudice me; and in the latter Caſe, the Act of God ſhould prejudice me, which is againſt two Rules of Law, that the Act of a ſtranger, or the act of God ſhall not prejudice me, wherefore without queſtion the aſſent comes in due time. Beſides, if a Legatee dieth before aſſent to a Legacie, the ſame ſhall be aſſets in the hands of his Executors, and the Legatee before aſſent hath an intereſt demandable in the Spiritual Court. An Executor before probate ſhall not have an Action, but he may releaſe an Action, becauſe that the right of the Action is in him: ſo in this Caſe, although that the Legatee before aſſent hath not an intereſt grantable, yet he hath an Intereſt releaſable. A man ſurrenders Copyhold Land to the uſe of another, and the ſurrenderee dieth before admittance, yet his heir may be admitted;

and this Caſe is not like thoſe Caſes put at the Bar, where there is but a meer poſſibility, and not the leaſt Intereſt; as where the grantee of a reverſion dieth before Attornment, or the deviſee before the deviſor, in thoſe Caſes the parties have but a meer poſſibility, and therefore countermandable by death: but it is otherwiſe in our Caſe, as I have ſhewed before, and therefore I conclude that here is a good aſſent, and that in due time, and therefore that the *Ejectione firme* brought by the Plaintiff well lieth.

Dale *and* Worthyes Caſe.

212. *Dale* brought a Writ of Error againſt *Worthy* to reverſe a Judgment given in the County-Palatine of *Cheſter*; and the Writ of Error bore *Teſte* before the Plaint there entred, and whether the Record were removed by it or not, was the Queſtion: and the Court, *viz. Mallet*, *Heath* and *Bramſton* were clear of opinion, without any ſolemn debate, that the Record was not removed by that Writ of Error, becauſe that if there be not any plaint entred at the *Teſte* of the Writ, how can the *Proceſſus* according to the Writ be removed, when there is no *Proceſſus* entred? and that failing, all fails; and beſides, it is meer for delay of Juſtice: and they agreed, that a Writ of Error bearing *Teſte* before Judgment is good, as is the book of 1 *E.* 5. 4. becauſe that there the foundation ſtands good, and it is the uſual courſe of practiſe for the preventing and ſuperſeding of Execution.

Tuder *againſt* Rowland.

213. AN *Ejectione firme* was brought; and in the Writ was *vi & armis*, but it wanted in the Declaration, and whether it were Error or not, or whether it were amendable or not, was the Queſtion: and *Shaftoe* for the Plaintiff held clearly that it was not Error; but the Court did not hear it at that time: the Caſe was Entred *Paſch.* 16 *Car. Rot.* 333.

214. *Bolſtrood*

214. *Bolſtrood* prayed a Prohibition to a Court-Baron as alſo an Attachment againſt the Steward for dividing of Actions to bring the ſame within their Juriſdiction to defeat the Common Law, as alſo for refuſing to ſuffer the Defendant to put in any other Attorney for him than one of the Attorneys of that Court: and the Court awarded a Prohibition, and the Steward *Darey* of *Lincolns-Inn*, then at the Bar, the Court ruled that he ſtand committed until he had anſwered to interrogatories concerning that miſdemeanor; and they ſaid, That an Attorney at Common Law is an Attorney in every inferiour Court, and therefore ought not to be refuſed.

Rudſton *and* Yates *Caſe, entred* Hill. 15 Car. *Rot.* 313.

215. RUdſton brought an Action of Debt upon a Bond againſt *Yates*; the Defendant demanded *Oyer* of the deed and condition thereof, and upon *Oyer* it appeared, that the Bond was conditioned to perform an award: to which the defendant pleaded that the Arbitrators made no arbitrament; upon which they were at iſſue, and the Jury found this ſpecial Verdict, that the Defendant *Yates* and one *Watſon* ſubmitted themſelves to Arbitrament, and found that the Arbitrators made an Award, and found the Award *in hæc verba*; but further, they found that *Watſon* was within age at the time of the ſubmiſſion: and whether upon the whole matter the Arbitrator had made any award or not, the Jury left it unto the Court; ſo as the Queſtion is no other, but whether an Infant may ſubmit himſelf to an award or not: for it was agreed, that if the ſubmiſſion were void, that the award was void, and by conſequence the Bond void; and note, that the Caſe was, that *Yates* bound himſelf that *Watſon* who was an Infant ſhould perform the Award; and the Condition recites, that where *Watſon*

Watſon who was an Infant had ſubmitted himſelf to an award, that the Defendant binds himſelf that he ſhould perform it, &c. So then if the Submiſſion be void, all is void; no ſubmiſſion, no award, and ſo no breach of the Condition, and therewith the Books agree, 17 E. 4. 5. 19 E 4. 1. 28 H. 6. 13. 5 *Rep.* 78. 10 *Rep.* 131. *b.* And by Juſtice *Mallet*, the ſubmiſſion is void, and void in part, void in all, for a ſubmiſſion is an entire thing, and therefore cannot be void as to the Infant, and ſtand good as to the man of full age. There are but two Books expreſs in the point, 14 *H.* 4. 12. & 16 *H.* 6. 14. and none of thoſe are of any authority; in the firſt there is no debate of the Caſe. And the ſecond is a flat quere: and as I conceive the better Opinion is, that the award is void; for where it is there objected that it may be for the avail of the Infant, *Br. tit.* Coverture and Infancie 62 ſays Quere of that, for it may be that the recompence given by the award, may be of greater value than the Law would give in the Action, and therefore by poſſibility it may be a diſadvantage unto him; and the Caſe betwixt *Knight* and *Stone*, *Hill.* 2 *Car.* in this Court, *Rot.* 234. where this very point was in queſtion, it was reſolved that if the Infant had been bound to perform the award, that the Obligation had been void. Further, it was agreed, that if it appear afterwards to be to his prejudice, that that ſhall make the award void; but the principal point was not adjudged, becauſe that the parties agreed. But whereas it was then, and now alſo objected, That if an Infant cannot ſubmit himſelf to an Arbitrament, that thereby he ſhould be in a worſer caſe than a man of full age, for he may have done a Treſpaſs which ſubjects himſelf to damages by ſuit in Law, which if he cannot diſcharge by this way, he ſhould be in a worſe condition than a man of full age, for he ſhould loſe that advantage. To that he anſwered, that if an Infant ſhould be permitted to that, he might have loſs thereby, for he hath not diſcretion to chuſe a competent Arbitrator, and an Arbitrator might give greater damage than the cauſe did require: and he is worſe than a Judge of the Court is; he is not ſworn, a Judge is: Beſides, an Infant hath divers priviledges, which

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the Court would allow, but an Arbitrator not. If an Infant make default, the ſame ſhall not bind him; ſo if he confeſs an Action, the ſame ſhall not bind him, and therefore he is in better Caſe without ſubmiſſion, than by it: and if an Infant cannot chuſe an Attorney, much leſs a Judge, for an Arbitrator is a Judge: an Infant cannot bind himſelf Apprentice, although it may be pretended to be for his benefit; ſo 21 *H.* 6. 31. he cannot chuſe a Bayliff, yet that is for his benefit; he cannot give an acquittance if he do not receive the money, 5 *Rep. Ruſſels* caſe, but if it be apparent for his benefit, it may be good, as a Leaſe of Ejectment to try a title made by an Infant is good, becauſe it is apparent for his benefit: an Infant is *in cuſtodia Legis*, and therefore we are bound by Oath to defend him. Beſides, an Infant hath not power to diſpoſe of his goods himſelf, and then how can he give ſuch a power to another? For which reaſons he conceives the ſubmiſſion void; and if no ſubmiſſion, no award; and therefore he gave Judgment againſt the Plaintiff, *Quod nihil capiat per billam.* Juſtice *Heath* alſo againſt the Plaintiff: True it is, that in this Caſe a ſtranger is bound that the Infant ſhall perform the award, but that recites the ſubmiſſion by the Infant; and the iſſue is, whether they made any award or not, ſo as the ground is, whether there be any ſubmiſſion or not; for no ſubmiſſion, no award, that ſo by conſequence Judgment ought to be given againſt the Plaintiff: and he held clearly that the ſubmiſſion is void, that an Infant cannot ſubmit himſelf to an Arbitrament: the Judgment of Arbitrators (provided that they keep themſelves within their Juriſdiction) is higher than any Judgment given in any Court; for if they erre, no Writ of Error lieth to reverſe their Judgment, and there is not ſo much as equity againſt them, and therefore it ſhould be a hard caſe, that an Infant ſhould have power to ſubmit himſelf to that which ſhould be final againſt him, and no remedy; for, *conſenſus tollit errorem:* wherefore he conceived that the ſubmiſſion was void; and if that which is the ground fails, all fails. An Infant may take any thing, for that is for his advantage, and cannot prejudice him; and the Church like an Infant

Infant is in perpetual Infancie, and *conditionem meliorem facere potest*, but *deteriorem nequaquam*: And where it was objected in this Case, that this submission might be for the avail of the Infant, and therefore should be good; he answered, and took this for a rule, that an Infant shall never submit himself to any thing under a pretence of benefit, which by possibility may prejudice him; and with that agreeth the better Opinion of 10 *H.* 6. 14. that it shall not bind him because it may be to his prejudice, for they may give greater damages than peradventure the Law would give in any Action brought against an Infant. But 14 *H.* 4. is not any Authority. Where it was objected, that it shall be voidable at the election of the Infant; To that he answered, that it is absolutely void, and therefore there cannot be any Election; and it should be hard, that the man of full age should be bound, and the Infant not: an Infant shall not be an accomptant, because that Auditors cannot be assigned to him; and he conceived that an Infant cannot bind himself an Apprentice, but it is usual in such cases for some friend to be bound for him; and as this Case is, it appeareth by the Award that it might be for the prejudice of the Infant. For the Arbitrators award, that the Infant shall pay five pound for quit-Rents and other small things; now what these small things were *Non constat*, and they might be such things, for which by the Law the Infant was not chargeable; and by the same reason that they may assess five pound, they might have set twenty pound and more; and it should be inconvenient that an Infant should have such a power to submit himself to the Judgment of any which might charge him in such manner. Besides, part of the Award is void for the incertainty, for it is said small things; and it doth not appear what in certain; and void in part, void in all; and for these reasons he gave Judgment against the Plaintiff. *Bramston* Chief Justice agreed, that the submission is void, and not voidable only, as it was objected; for then it should be *tale arbitrium* until reversal of it. 10 *H.* 6. and 14 *H.* 4. are no Authorities; or if they be, the best Opinion is for the Infant, as it hath been observed, and *Knight* and *Stones*

case

Caſe cited before is no authority, for no Judgment was given in the Caſe. But all in that caſe agreed, that the award was void; becauſe it was awarded that the Infant upon the payment of an hundred pounds ſhould make a releaſe, which proves that the ſubmiſſion was alſo void; becauſe that if it ſhould be good, by the ſame reaſon the releaſe. Where it was objected, that it ſhall be voidable at the Election of the Infant; To that he anſwered, that the ſubmiſſion ought to be either abſolutely good, or abſolutely void; for the end of an Arbitrament is to conclude and compoſe controverſies, and the Arbitrators are Judges to determine them; which ſhould never be done, if it ſhould lie in the power of the Infant to make good or fruſtrate the Arbitrament at his Election; for which cauſe, to ſay that it ſhall be conditional is againſt the nature of an Arbitrament; and to ſay, that it ſhall bind the Infant abſolutely cannot be; and to ſay, that it ſhall bind the one and not the other is unequal; Beſides, there can be no election in this caſe; for if he were within age, nothing binds him, if at full age he ought to perform it. Beſides, the Arbitrament it ſelf, as this Caſe is, and as it was before obſerved by *Heath*, is void: for the award was, That the Infant ſhould pay five *l.* for quit-Rents and other ſmall things, and it doth not appear what thoſe ſmall things were; ſo that for any thing that appeareth, it might be for ſuch things for which the Infant by the Law was not chargeable, and therefore is void for the incertainty; and void in part, void in all; and by the ſame reaſon as the Arbitrators might award five pound, they might award twenty pound or more. But he conceived that if it had appeared in certain, that the things had been ſuch, for which the Infant is by the Law chargeable, perhaps it had been good; but here it doth not appear what the things were, and therefore it was not good. *Trinit.* 4 *Car. Pickering* and *Jacobs* caſe, it was reſolved that a Bond taken for neceſſaries of an Infant was good, 8 *E.* 4. Arbitrators Award more than the debt is, the ſame is naught; ſo here, for any thing that appeareth to the contrary, the Award was to pay ſuch things as the Infant was not liable to pay; and therefore void. But

note Reader, I conceive that an Infant cannot ſubmit himſelf to an Arbitrament for things for which by the Law he is chargeable, for the reaſon given before, becauſe the Arbitrators may charge him farther than by the Law he is liable; which ſhould be to his prejudice, and he hath not any remedy for it. Judgment was given againſt the Plaintiff, *Quod nihil capiat per Billam.* The Caſe was entred *Hill.* 15 *Car. Rot.* 313.

The Serjeants *Caſe, Trin.* 17. *Car. in the Common Pleas.*

216. THe Serjeants Caſe was this. *A.* ſeiſed of Land in fee, *B.* his Brother levied a Fine *come ceo* to *C. B.* had iſſue *D.* and died. *A.* died without iſſue, *C.* entred: *D.* entred and gave it to *C.* and *R.* his wife, and to the heirs of their two bodies. *C.* levied a Fine *come ceo* with proclamations to *D. C.* and *R.* have iſſue *L. C.* dieth: *D.* confirmeth to *R.* his eſtate, to have to her and the heirs of her body by *C.* begotten. *R.* dies, *D.* enters, *L.* ouſtes him, *D.* brings entre in the *Quibus.* In this Caſe there are two points; Firſt, Whether the Fine levied by *B.* ſhall bar his Iſſue as this Caſe is, or not: and that is the very point of *Edwards* and *Rogers* Caſe, *Paſch.* 15 *Car.* in the Kings Bench: and admitting it ſhall not bar *D.* then the ſecond point is, what is wrought by the confirmation, if by that the Iſſue in Tail ſhall inherit or not, and that is the very point in the 9 *Rep. Beaumonts* Caſe.

Saunderſon *and* Ruddes *Caſe in Common Pleas, Trin.* 17 Car.

217. *Saunderſon* brought an Action upon the Caſe for words againſt *Rudde*; the Caſe was this: The Plaintiff being a Lawyer, was in competition for a Stewardſhip of a Corporation; and the Corporation being met together for Election of a Steward, the Plaintiff was propounded to

to be Steward, and then the Defendant being one of the Corporation, ſpake theſe words of the Plaintiff to his Brethren of the Corporation: *He (prædict' the Plaintiff innuendo) is an ignorant man, and not fit for the place:* and he ſaid, that by reaſon of ſpeaking of theſe words, that they refuſed to elect him Steward; and whether theſe words were actionable or no, was the Queſtion. This caſe was argued twice in *Trinity-Term* by *Callis* and *Gotbold* Serjeants, and the Judges ſeemed to incline to opinion, That the words were Actionable, but yet no judgment is given.

Selden *againſt* King *in Common Pleas*, *Trin.* 17 *Car. Regis.*

218. IN a Replevin the Caſe was thus: A man granted a rent out of certain Lands, and limited the ſame to be paid at a houſe, which was another place off the Land; and in the grant was this clauſe, that if the rent were behind, and lawfully demanded at the houſe, that then it ſhould be lawful for the grantee to diſtrein: the Rent was afterward behind, and the grantee diſtreined, and upon traverſe taken upon the demand, whether this diſtreſs upon the Land (which had been good in Law if there had not been a ſpecial limitation of demand at a place off the Land) be a good demand as this Caſe is, was the point. *Mallet* Serjeant: the diſtreſs is a demand in it ſelf, and there needs not any other demand, although the rent be to be paid off the Land as here. And it was adjudged in this Court about 3 years paſt, that the diſtreſs was a ſufficient demand: but I confeſs that a Writ of Error is brought in the Kings Bench, and they incline there to reverſe it, and there is no difference where the rent is payable upon the Land, where not, and ſo it was adjudged, *Trin.* 3 *Car. Rot.* 1865 or 2865. betwixt *Berriman* and *Bowden* in this Court: and he cited alſo *Fox* and *Vaughans* Caſe, *Paſch.* 4 *Car.* in this Court, and Sir *John Lambes* caſe, *Trin.* 18 *Car. Rot.* 333. in this Court, both adjudged in the point; and he cited many other Judgments.

Termyn Serjeant contrary, that the diſtreſs is no ſufficient demand as this Caſe is: he ought to demand it at the place appointed by the grant, for it is part of the grant, and the words of the grant ought to be obſerved, 28 *H.* 8. *Dyer* 15. and in the Comment. 25. *a.* it is ſaid, that *Modus legem dat donationi*, and therefore by the ſame reaſon that the grantor may appoint the time and place of payment, as here he hath done; by the ſame reaſon he may appoint a place for the demand, and that he ſhall make that demand before he diſtrein; for the ſame is neither repugnant nor impoſſible, nor againſt the Law, and therefore good, and by conſequence ought to be obſerved: and then he anſwered the Caſes which were cited to be adjudged againſt him. In *Symmons* Caſe in the Kings Bench there it was reſolved that a diſtreſs was a demand in Law, and a demand in Law is as ſtrong as a demand in fact, as it was ſaid by Juſtice *Barckley* in debate of that Caſe. But note, that in that Caſe there was no time in certain limited: and further, in that Caſe the Rent was payable upon the land, and therefore in that Caſe I agree that a diſtreſs will be a good demand, becauſe that the demand is to be made upon the land, but it is not ſo in our Caſe. In *Sands* and *Lees* caſe, *Trin.* 20 *Jac.* in this Court, there alſo the rent was payable upon the land. *Berriman* and *Bowdens Caſe*, *Trin.* 3 *Car.* cited before, I agree was our very Caſe in point, but there Judgment was given upon Confeſſion, and therefore doth not rule our Caſe; and in Sir *John Lambes* Caſe there was no Judgment given, and therefore that doth not rule our Caſe; but *Melſam* and *Darbies* caſe *M.* 6 *Car. Rot.* 389. in the Kings Bench a Caſe in the point, where Judgment was reverſed upon a Writ of Error there brought for want of demand, and *Selden* and *Sherleys* caſe in that Court, a Caſe alſo in the point was reverſed, *Mich.* 16 *Car.* in the Kings Bench upon a Writ of Error brought for want of demand: wherefore I conclude, that there ought to have been an actual demand at the houſe according to the grant in our Caſe, and therefore the Traverſe in this Caſe taken by the grantor is well taken. Note, that Juſtice *Crawley* ſaid, that *Lambes* Caſe was adjudged.

ed that there needed no demand, and he ſaid, that there were three Judgments accordingly in this Court: but *Rolls* Serjeant ſaid, that *Darbies* Caſe was reverſed in the Kings Bench for want of a demand. But note, that *Foſter* and *Reeve* Juſtices, did incline that there ſhould be a demand, and ſo *Bankes* Chief Juſtice, for he ſaid, that it is part of the contract, and like a condition precedent; for as in a condition precedent, a man ought to perform the condition before he can take any thing by the grant, ſo in this Caſe the grantee ought to make a demand to enable him to diſtreyn, for before the demand he is not by the manner of the grant (which ought to be obſerved) entitled to a diſtreſs: wherefore he gave direction to the Counſel that they would view the Records, and ſhew them to the Court; and further he ſaid to them, that where it appeareth, that the Rent was demandable upon the land, that thoſe caſes were not to the purpoſe, and therefore wiſhed that they would not trouble the Court with them.

Levet *and Sir* Simon Fanſhawes *Caſe in Common Pleas, Trin.* 17 Car. Regis.

219. LEvett brought debt againſt Sir *Simon Fanſhawe* and his Wife as Executrix of another, and ſued them to the *Exigent*, and at the return of the *Exigent*, the Defendant Sir *Simon Fanſhawe* came in voluntarily in Court, and prayed his Priviledge becauſe he was an Officer of the Exchequer: and whether he ſhould have his priviledge in that caſe or not, was the queſtion, and that reſts upon two things. Firſt, becauſe he is ſued, as this caſe is, meerly for conformity and neceſſity-take, and in the right of another, *viz.* in the right of his wife as Executrix. And ſecondly becauſe he demands his priviledge at the *Exigent*. *Whitfield* Serjeant, that he ought to have his priviledge, and he cited Preſidents as he ſaid in the point, as *Paſch.* 44 *Eliz.* in the Exchequer, *James Aſhtons* caſe ſervant to the Treaſurer, and *Paſch.* 23 *Jac. Rot.* 131. *Stantons* caſe

caſe alſo in the Exchequer, in both which caſes he ſaid husband and wife were ſued in the right of the wife, and the husband had his priviledge. But he cited a Caſe which was nearer our Caſe, and that was *Hill.* 8. *Jac.* in the Exchequer, *Wats* and *Glovers* caſe, where husband and wife were ſued in the right of the wife as Executrix; and he ſaid, that it was over-ruled that the husband ſhould have his priviledge 22 *H.* 6. 38. and 27 *H.* 8. 20. in thoſe Caſes the husband and wife were ſued in the right of the wife, and yet the husband was allowed his priviledge: But ſee Reader 34 *H.* 6. 29. & 35 *H.* 6. 3. againſt it: And note, that many of theſe caſes come to the ſecond point, whether he may demand his priviledge at the *Exigent* or not; but for that ſee 9 *E.* 4. 35. *Br. Priviledge* 22. & 10 *E.* 4. 4. *Br. Priviledge* 40. *Rolls* Serjeant contrary, that the Defendant ought not to have his Priviledge; and he ſaid, that uſe, practiſe, and reaſon is againſt it; and he took theſe differences. Firſt, where the Defendants are coming to make their appearance, and are arreſted, as in 22 *H.* 6. 20. and where they are ſued in one Court, and the husband demands his priviledge, becauſe he is an Officer in another Court, as in our Caſe. Secondly, where he is Defendant, and where he is Plaintiff. And laſtly, where he is ſued in his own right, and where in the right of another, as in our Caſe. For in the firſt of theſe differences he ſhall have his priviledge, in the latter not; and it is to ouſte this Court of Juriſdiction, and therefore ſhall be taken ſtrictly. Beſides, if in this Caſe the Defendant ſhould have his priviledge, we ſhould be without remedy; for we cannot have a Bill againſt the wife, and we have no remedy to make the wife to appear; and therefore it ſhould be a great prejudice to us, if he ſhould have his priviledge. Wherefore he prayed that the Defendant might not have his priviledge. Note, that *Bankes* Chief Juſtice ſeemed to agree the differences put by *Rolls*, and alſo he conceived that point conſiderable, whether the Defendant had not ſurceaſed his time in this Caſe, becauſe he demands his priviledge at the *Exigent*, and not before. And note, the whole Court, *viz. Foſter, Reeve, Crawley* and *Bankes* Chief Juſtice ſeemed to incline,

incline, that the Defendant ſhould not have his priviledge, becauſe that the Action was brought againſt him and his wife, in *auter droit*, viz. in the right of the wife as Executrix: but no Judgment was then given.

Hillary 17° Car' *in the Common Pleas.*

Moſs *and* Brownes *Caſe.*

220. MOſſe exhibited a Bill in the Court of Requeſts againſt *Brown*, and in his Bill ſet forth that the Defendant was indebted unto him in the ſum of 400 pounds for wares delivered to him: and further, he ſhewed how that the Defendant was decayed in his eſtate, and was not able to pay him, and therefore he was content to accept of an hundred pound for the whole; and that the Defendant at the payment of the ſaid hundred pound, required the Plaintiff to give him a general releaſe, and then promiſed him in conſideration that he would make him a general releaſe, that he would pay to him the reſidue of his debt whenſoever God ſhould pleaſe to make him able; and the defendant divers times afterwards did renew his promiſe with the Plaintiff. Further, he ſhewed that now a great eſtate to ſuch a value is fallen to the Defendant, and that now he is able to pay him, and notwithſtanding refuſeth ſo to do; which is the effect of the Plaintiffs Bill. To that the Defendant anſwered and pleaded the Statute of Limitations of Actions: and the Court of Requeſts would not admit this Plea. But note, the Defendant pleaded firſt the general iſſue, that he made no ſuch promiſe, upon which they were at iſſue, and found againſt him; and afterwards he pleaded the Statute of Limitation, and upon the whole matter Serjeant *Clarke* moved for a Prohibition. Firſt, becauſe the Bill is in the nature of an Action upon the Caſe at the Common Law, and whether he promiſed or not promiſed is triable at Law.

Secondly,

Secondly, because the Court refused the Plea of the Statute of Limitations, which they ought not to do, because there is no remedy in Equity against a Statute. Serjeant *Whitfield* contrary, that no Prohibition ought to be granted. First, because the Plaintiff hath no other remedy but in Equity, because that the *Assumpsit* made before the release is discharged by the release, and the *Assumpsit* which was after, is void, because there is no consideration, the debt being released before. Secondly our case is not within the Statute of Limitations, for it is but a trust reposed in the Defendant that he would pay the residue when God should make him able: and being a bare trust, is not taken away by the Statute of Limitations. But he agreed for any Action which is within the Statute, and is superannuated, that there is no remedy in Equity. But in answer to that it was said by *Clarke*, that there is no trust expressed in the Bill. But notwithstanding that, it was resolved by the whole Court, *viz.* *Foster*, *Reeve*, *Crawley* Justices, and *Banks* Chief Justice, that no Prohibition ought to be granted, for the reasons given before by *Whitfield*; and they said, that although no trust be expressed, yet if it appeareth upon the whole Bill that there is a trust, it is enough, and he needs not to express it. And note, there was an order of the Court of Requests produced by *Clarke*, by which it was ordered, That the parties should take issue only upon the subsequent promise, and should not meddle with the first, which as the Court conceived made the Case a little worse; notwithstanding the Court would not award a Prohibition; for they said, so long as they order nothing against the Law, it is good, and they ought to be Expositors of their own Orders: & therefore if it appeareth upon the merits of the Cause, and the body of the Bill, that they have Jurisdiction of the Cause, and proceed as they ought, be their Orders what they will, it is not material; and therefore it was resolved by the whole Court that no Prohibition should be granted in this Case.

Hill.

Hill. 17° Car. *in the Common Pleas.*

221. *Dudley* who was a Parſon did libel in the Arches againſt *Crompton* for ſcandalous and defamatory words, which words were theſe: *Thou*, (meaning the Plaintiff) *lyeſt, thou art a fool*, *and* (putting his hand behind him) *bid him kiſs there*: and further ſaid to him, *Thou haſt ſpent* (ſo much a year) *in drunkenneſs*: and Sentence was given for the Plaintiff, and now four years after Sentence the Defendant prayed a Prohibition, and the Court, *viz.* *Foſter*, *Reeve*, *Crawley* Juſtices, and *Bankes* Chief Juſtice, were againſt the Prohibition becauſe the Defendant came too late; but if he had come in due time, the three Juſtices did incline that a Prohibition would have lien, becauſe that the words are words only of paſſion and anger, and God forbid that all words ſpoken only in wrangling and anger ſhould bear Action: But the Chief Juſtice inclined that the Defendant was puniſhable in the Eccleſiaſtical Court for thoſe words; for he ſaid, that the ſuit there is *pro ſalute animæ & reformatione morum*, and it was fit that his manners ſhould be reformed, who ſpake ſuch words of a man in Orders and a reverend Miniſter. And he ſaid, that although that he held not that where there is no remedy at Law, that there they might ſue in the Eccleſiaſtical Court; yet he ſaid, that in many caſes, where there is no remedy at Law, yet there is remedy in the Eccleſiaſtical Court, and ſo he conceived in this Caſe. But that which made Juſtice *Reeve* to doubt whether a Prohibition ſhould iſſue as this Caſe was, or not, was for the incertainty of their Sentence, which was for ſpeaking of theſe words contained in the Articles, *aut eorum aliqua*, which he ſaid is therefore not good, for he ſaid, that Judgments or Sentences ought to have theſe two things, Verity and Certainty, and if there

want any of these two, it is not good; and if it should be suffered it were a mischievous case, for by this trick they might hold Plea of words not within their Jurisdiction, and we should not have power to prevent it; for if some of the words should be actionable, some not, they might by this way hold Plea as well of words which were not actionable or punishable by them as of those which were. To which *Foster* agreed; but Justice *Crawley* and the Chief Justice conceived that no Prohibition would lie notwithstanding that, for that might be the course amongst them; and although it be incertain, yet it may be allowed by them for Law: and *Reeve* was of opinion, that a man might be indicted at the Assises before the Commissioners of *Oyer* and *Terminer* for speaking of such defamatory words, and that he grounded upon the Commission of *Oyer* and *Terminer*, which giveth them power to hold Plea *de prolationibus verborum*, and he conceived that a man might be fined for them. But the Chief Justice contrary, for the Commission giveth them power to hold Plea *secundum legem & consuetudinem Angliæ*: Now if the speaking of such words be not punishable by the Law and Custome of *England*, then we cannot hold Plea of them by way of indictment or otherwise at the Assises for them.

222. It was said by the whole Court, that a bare Information at the Bar is not sufficient to cause the Court to examine any man upon Interrogatories; wherefore they ruled, that the party should make an *Affidavit*.

223. Judgment was given against the principal, and after a *Scire facias* was brought against the Bail, who appeared and pleaded *Nul tiel Record* of the Judgment given against the principal, upon which day was given to bring in the Record in Court, at which day the principal tendred his body in discharge of the Bail, and now it was prayed by *Pheasant* Serjeant

jeant, that it might be admitted; but *Reeve*, *Foſter* and *Banks* Chief Juſtice inclined againſt it: True it is, that the condition of the Bail is, that they render his body (indefinitely) withoue limiting any time in certain when they ſhall do it, or pay the condemnation: but yet they conceived, that if they appear and plead ſuch a dilatory Plea as this is, that thereby they have waived the benefit of bringing in his body: and Juſtice *Foſter* ſaid, that the ſame being general and uncertain, the Law ought to determine a time certain when it ſhall be done, for otherwiſe by the ſame reaſon that they may do it now, they may do it twenty years after, which ſhould be inconvenient and againſt the meaning of the condition. And *Reeve* ſaid, that if this trick ſhould be ſuffered, that the Bail might plead ſuch a dilatory Plea, and afterwards bring in the body of the Principal, the Plaintiff ſhould loſe all his coſts of ſuit which he had expended in the ſuit againſt the Bail, which would be miſchievous. But Juſtice *Crawley*, that the uſage hath always been, that the Bail might bring in the body of the Principal at any time before judgment given againſt them upon the *Scire facias*, and there are many preſidents in this Court to that purpoſe. To that the Court ſeemed to agree, if they plead not ſuch a dilatory Plea, as in this caſe: Therefore the Court awarded, that the Pronotharies ſhould conſider of it, and ſhould certifie the Court what the uſe hath been in ſuch caſe.

224. Serjeant *Pheaſant* came to the Bar, and ſaid to the Court, that antiently (as appeareth by our old Books) the uſage was, that the Serjeants in any difficult point of pleading, did demand of the Court their adviſe concerning it, and accordingly were uſed to be directed by the Court; wherefore he humbly prayed of the Court to be reſolved of this doubt. A man was impriſoned for not ſubmitting to Patentees of a Monopoly, after ſeven or eight years paſt, and then he brought an Action of falſe Impriſonment, and that is grounded upon the Statute of Monopolies, 21 *Jac.* c. 3. whether in this caſe the Defendant might plead the Statute of 21 *Jac.* c. 16. of

Limitations of Actions, or not, was the Queſtion. But the whole Court was againſt him, that they cannot be Judges and Counſellors, and that they ought not to adviſe any man, for by that means they ſhould prevent their Judgment; and they confeſſed that that was the uſe, when the Serjeants uſed to count at the Bar, as appeareth in our Books. But they ſaid, you ſhall never find the ſame to be uſed ſince they counted and declared before they came to the Bar, and theſe Counts and Declarations are upon Record, wherefore the Court upon theſe conſiderations would not adviſe him.

Dewel *and* Maſons *Caſe.*

225. THis Caſe of *Dewel* and *Maſon*, which ſee before, *pl.* 184. came now again in debate, and it was adjudged by the whole Court, *viz.* *Foſter*, *Reeve*, *Crawley* Juſtices, and *Bankes* Chief Juſtice, *nullo contradicente*, that the Plaintiff ought to have Judgment, and that upon theſe differences. Firſt, where the Defendant is to do a ſingle Act only, and where he hath election of two things to do. Secondly, the ſecond difference ſtood upon this, that no notice is to be given, or tender made of a thing which lieth not in the power or proper conuſance of the Plaintiff, ſo as the difference ſtands where it is a thing which lies in the conuſance of the Plaintiff, and where not: and therefore where the award was that the Defendant ſhould pay to the Plaintiff eight pound, or three pound and coſts of ſuit, as ſhould appear by a note under the Attorneys hand of the Plaintiff, it was reſolved in that Caſe, that although the Attorney be in ſome reſpect as a ſervant to his Maſter, yet to this purpoſe he is a meer ſtranger, and therefore the Plaintiff was not bound to make any tender of that note, but the Defendant ought to have gone to the Plaintiffs Attorney, and required a note of him of the coſts of ſuit, ſo as he might have made his Election: But they all agreed, that where it is a thing which lieth in the knowledge of the Plaintiff, that there he ought to have made a tender, or given notice, but in this Caſe it lieth not in the knowledge of the Plaintiff

Plaintiff, and he cannot compel the Attorney to make it, wherefore it was reſolved that the Plaintiff ſhould have Judgment.

226. A man libelled for Tithes in the Eccleſiaſtical Court, & in his libel he ſet forth, how that the Tythes were ſet forth, but that the Defendant did ſtop and hinder the Plaintiff to carry them away any other way than through the Defendants Yard, and when he was carrying them that way, the Defendant being an Officer did attach them for an Aſſeſsment to the poor, and did convert them to his own uſe, upon which a Prohibition was prayed, becauſe that the Tythes being ſet forth an Action of Treſpaſs lieth at the Common Law: but Serjeant *Clarke* was againſt the Prohibition, becauſe that the Libel is grounded upon the Statute of 2 *E.6. cap.* 13. which is, That if the Parſon, *&c.* be ſtopt or let in carrying his Tythes, that the party ſo ſtopping or letting ſhould pay the double value, to be recovered before the Eccleſiaſtical Judge. But notwithſtanding that, it was reſolved that a Prohibition ſhould iſſue, becauſe he that will ſue upon the Statute ought to mention the Statute, or to make his demand *ſecundum formam Statuti*. But here the Plaintiff doth not ſue upon the Statute, for he doth not mention it nor the double value as he ought; for they all agreed, that he ought to ground his Action upon the expreſs clauſe of the Statute for the double value, wherefore a Prohibition was granted.

227. It was reſolved upon the Certificate of the Pronotharies, *viz.* *Gulſon*, *Cory*, and *Farmer*, that the cuſtom of the Court was, That if a man ſueth another for ſuch a ſum, or thing for which the Plaintiff ought to have ſpecial Bail, and doth not declare againſt him in three Terms, that the Defendant being brought to the Bar by a *Habeas Corpus*, ought to be diſcharged upon an ordinary appearance, and that they ſaid is the courſe and practice in the Kings Bench, and that

that was now reſolved to be as a certain Rule from thenceforth in this Court by all the Judges, *viz. Foſter*, *Reeve*, *Crawley*, and *Bankes* Chief Juſtice.

228. It was ſaid by Juſtice *Reeve*, that if *A.* being ſeiſed of an Advowſon, grant the next preſentation to *B.* and *B.* makes a Bond to *A.* to pay him twenty pounds when the Church ſhall fall void, that that is Simony; and ſo he ſaid it was adjudged in this Court in *Pooles* Caſe: and the whole Court did agree that it was Simony; for otherwiſe by this way the Statute ſhould be utterly defeated: and note, that it was ſaid by Serjeant *Rolls* at the Bar, That it had been often adjudged, that the Obligor could not avoid ſuch an Obligation without ſpecial averment.

Palme *againſt* Hudde.

329. PALME brought a *Quare impedit* againſt *Hudde*, and the caſe was thus: It was debated by Serjeant *Godbold*, the Plaintiff brought a *Quare impedit* againſt the Defendant, the Defendant ſhewed how the King was intitled by reaſon of Simony, and that the King had preſented the Defendant, and that he was *perſona imperſonata* of the preſentation of the King; the Plaintiff denied the Simoniacal contract, upon which they were at iſſue, and it was found for the Defendant, ſo as that Judgment was given for the Defendant. And the ſame Plaintiff brought this ſecond *Quare impedit* againſt the ſame Defendant, who pleaded all the matter before and the Judgment, but did not ſay that he was now *perſona imperſonata*, but that he was *tunc perſona imperſonata*, and that was ſaid by the Serjeant to be naught: for he ſaid, that at the Common Law, no Parſon might plead to the Title of the Parſonage but only in the abatement of the Writ, or ſuch like Pleas: ſee *Lib. Entries* 503, and 522. and 8 *Rep. Foxes* caſe: and he ſaid, that that is a Plea at the Common Law, and not upon

upon the Statute of 25 *E.*3. for then he ought to have pleaded, that *Eſt perſona imperſonata*, and not that *fuit*, and that to enable him to plead to the Title of the Patronage, according to the Statute, for he who will plead according to the Statute ought to purſue it, or otherwiſe his Plea is not good, & he cannot plead to the Title of the Patronage without ſhewing that he is *perſona imperſonata:* the Books are clear 7 *Rep.* 25, 26. 15 *H.*7. 6, and 7. 2 *K.*2. *Incumbt.* 4. 4 *H* 8. *Dyer* 1. & 27. And to ſay, that *tunc fuit perſona imperſonata*, is but an argumentative Plea, that becauſe he was then, ſo he is now, and ſuch Plea is not good, for it ought to be poſitive and not by way of argument, or illation. Beſides, it may be that he was *perſona imperſonata*, *tunc*, and not *tunc*, for he might reſigne or be deprived after, or the like, and therefore it is a *Non ſequitur* that he was *perſona imperſonata* then, and therefore now, and it ſhall be intended rather that he is not *perſona imperſonata nunc*, for *paroles ſont Plea*, and the Plea of every man ſhall be taken ſtrong againſt himſelf; wherefore he concluded that the Plea was not good. *Foſter* agreed that the Parſon cannot plead to the Title of the Patronage without ſhewing that he is *perſona imperſonata*; but the Queſtion here is, as he conceived, Whether the Plaintiff be not ſtopped by this recovery and Judgment yet remaining in force to ſay the contrary. *Bankes* Chief Juſtice: It is true, that generally the Parſon without ſhewing that he is *perſona imperſonata*, cannot plead to the Title of the Patronage. But whether the Defendant cannot plead the Record and Judgment, yet in force againſt the Plaintiff, without ſhewing that he is *perſona imperſonata*, that is the Queſtion here. Note, it was the firſt time it was argued.

Harwel *againſt* Burwel *in a* Replevin *in the Kings Bench.*

230. THe Caſe was thus: A man acknowledged a Statute to the Plaintiff, and afterwards granted a Rent-charge to the Defendant, afterwards the Statute is extended and ſatisfied

fied, and then the grantee of the Rent diſtreins. And whether he might diſtrein without bringing a *Scire facias*, was the Queſtion. And by Serjeant *Rolls*, he cannot diſtrein without a *Scire facias* brought. and he took it for a Rule, That becauſe the Conuſee came in by matter of Record, he ought not to be put out or diſturbed without matter of Record, for if that ſhould be ſuffered, it would be a great diſcouragement to Debtees to take this manner of ſecurity for their debts: and the Conuſor cannot enter without bringing a *Scire facias* and if the Conuſor himſelf cannot enter, it is a good argument *à fortiori* that the grantee of a rent cannot diſtrein without a *Scire facias*; and that the conuſor himſelf cannot enter without bringing a *Scire facias*, *vid.* 15 *H.* 7. 15. 4 *Rep.* 67. *Fullwoods* caſe. And the grantee of the Rent is as well within the ground and rule before put as the conuſor himſelf, and therefore he compared the caſe to the caſe in the 10 *Rep.* 92. that he who claims under another ought to ſhew the original conveyance. But he took a difference where the party comes in by act of Law, and where by the act of the party; he who comes in by act of Law, ſhall not be put to his *Scire facias*, for ſo he ſhould be without remedy, and if that ſhould be permitted, it ſhould a be ſubtile way for the conuſor to avoid the poſſeſſion of the conuſee, and then he himſelf to take benefit of it, and that ſhould be a fine way to defeat the Statute. Beſides, by this way if the Statute ſhould be ſatisfied by caſual profit, or if the time ſhould be expired and the Statute ſatisfied by effluxion of time, if in that Caſe the grantee ſhould be permitted to diſtrein the beaſts of the conuſee for a great Rent, perhaps before that the Conuſee by poſſibility might remove from the Land, it would be a great diſturbance to the Conuſee. Beſides, if a ſtranger enter upon the conuſee, the conuſee upon his regreſs may hold over: but not ſo in this Caſe, where the grantee of the Rent diſtreins, and that ſhould be alſo a great prejudice to the conuſee. But it was objected that the grantee of the rent could not have a *Scire facias*, and therefore if he might not diſtrain, he ſhould be without remedy; To which he anſwered, that if it ſhould be ſo, it is his own

fault

fault, for he might have provided for himſelf by way of covenant. But he conceived that he might have a *Scire facias*, for he ſaid, that it is a Judicial Writ iſſuing out of the Rolls, which might be framed and made according to the caſe of any man: and it is not enough to ſay, that there was never ſuch a Writ granted in the like caſe, but he ought to ſhew where it was ever denied: beſides, it is not always neceſſary that he that ſhall have this Writ ſhould be party or privy to the Record, as appeareth by theſe Books, 46 *Aſſ. Scire facias* 134. 32 *E.* 3. *Scire facias* 101. and 38 *E.* 3. 12. *Br. Scire facias* 84. Again, it is not neceſſary that the *Scire facias* ſhould be either *ad computandum*, or *ad rehabendum terram*, as it was objected, for as I have ſaid before, it may be framed according to the caſe of any man, and vary accordingly: wherefore he prayed Judgment for the Plaintiff: and note, that at this time Juſtice *Heath* ſeemed to incline for the Plaintiff.

Thorne *againſt* Tyler *in a Replevin.*

231. THe Plaintiff ſhewed that the Defendant took certain Beaſts of the Plaintiff ſuch a time and place, and detained them againſt gages and pledges, *&c.* The Defendant as Baily of the Mannor of the Lord *Barckley* made conuſance of the taking of the cattle, and ſaid, that long time before the taking of them, the Lord *Barckley* was ſeiſed in fee of a Mannor in *Glouceſterſhire*, within which there were Copyhold-Tenants time out of mind, demiſeable for one, two, or three lives: that there was a cuſtom within the ſame Mannor, that if any copyhold-tenant did ſuffer his meſſuage to be ruin'd for want of repairing, or committed waſte, & that is preſented by the homage, that ſuch tenant ſo offending ſhould be amerced, and that the Lord had uſed time out of mind to diſtrein the beaſts as well of the tenant as of the under-tenant of ſuch cuſtomary tenements, *levant* and *couchant* upon ſuch cuſtomary tenements for ſuch amercement; and further ſaid, that one *Greening* was tenant for life of a cuſtomary tenement within

that Mannor, and made a Leaſe unto the Plaintiff for one year, and that 15 *Car.* the homage did preſent that *Greening* had ſuffered his Barn, parcel of the cuſtomary Tenements aforeſaid, to fall for want of repair, for which he was amerced to ten ſhillings; and that in *July* 16 *Car.* the Defendant as Bayly of the Lord *Barckley* did diſtrein the Plaintiffs cattle, being under-tenant for the ſaid amercement upon the ſaid cuſtomary tenement, and ſo he made conuſance and juſtified the taking of the beaſts as Bayly of the Lord *Barckley*. The Plaintiff confeſſed that *Greening* was tenant, and that he made a Leaſe to the Plaintiff for a year; and further he confeſſed the want of repairing and preſentment, and the amercement upon it, but he denied that there is any ſuch cuſtome: upon which they were at iſſue, and the Jury found for the Defendant, that there was ſuch a cuſtom, and it was moved in arreſt of Judgment that the cuſtom was not good, becauſe it was unreaſonable; for here the Tenant offended, and the under-tenant is puniſhed for it, which is againſt all reaſon that one ſhould offend and another ſhould be puniſhed for it. Beſides, the under-tenant here is a ſtranger, and the cuſtom ſhall never extend to a ſtranger, and therefore the cuſtom to puniſh a ſtranger who is not a Tenant of the Mannor is a void cuſtom. Further, it was ſaid that the amercement properly falls upon the perſon, and therefore being perſonal it cannot be charged upon the under-tenant. But notwithſtanding all theſe Objections, it was reſolved by all the Juſtices upon ſolemn debate, that the cuſtom was good, and therefore that the avowant ſhould have Judgment. Juſtice *Mallet*: cuſtom *ſi aliqua defalta fuerit in reparatione* to amerce the tenant and to diſtrein *averia ſua, vel averia ſubtententis levant* and *couchant* upon the cuſtomary tenement, is a good cuſtom. I agree that a cuſtom cannot extend to a ſtranger who is not within the Mannor, and therewith agreeth 3 *Eliz. Dyer* 194. *b pl.* 57. *Davis Rep.* 33. *a.* & 21 *H.* 6. and many other Books; but the matter here is, whether the Plaintiff be a ſtranger or not, and I conceive that he is no ſtranger but a good cuſtomary tenant, and he ſhall have any benefit or priviledge that a cu-

cuſtomary tenant ſhall have, although he holdeth but for one year, and by the ſame reaſon that he ſhall enjoy the priviledge of a cuſtomary tenant he ſhall undergo the charge; for *Qui ſentit commodum ſentire debet & onus*; and by the general cuſtom of *England* every Copyholder may make a Leaſe for one year, as is reſolved in the 4 *Rep.* 26. *a.* and it is good; and if ſo, then the Plaintiff here cometh in by cuſtom, and is no ſtranger but a good cuſtomary tenant, and therefore the cuſtom may well extend to him: as there is *Dominus pro tempore*, ſo there is *tenens pro tempore*, and ſuch is the Plaintiff here: and he held, that the wife that hath her widows eſtate, according to the cuſtom of the Mannor, is a good cuſtomary tenant. A woman Copyholder for life, where the cuſtom is that the husband ſhall be tenant by the curteſie, dieth, I hold the husband in that caſe a good cuſtomary tenant. In *Glouceſter* where this Land is, there is a cuſtom that Executors ſhall have the profits for a year, and I conceive them good cuſtomary tenants. Beſides, this under-tenant here is diſtrainable by the Lord for the rents and ſervices reſerved by the Lord, or otherwiſe by this way he might defeat the Lord of his ſervices. The cuſtom was, That a woman ſhould have her widows eſtate; the Copy-tenant made a Leaſe for one year and died, and adjudged that the woman ſhould have her widows eſtate as excreſcent by Title Paramount, the eſtate made for one year: ſee *Hob. Rep.* And as there the eſtate of the wife was derivative; ſo here: and although it be not the intire Copyhold eſtate, yet it is part of it, and a continuation of it, and is liable to every charge of the Lord, 6 *Rep. Swaines* caſe; wherefore he concluded that the cuſtom is good, and that the avowant ought to have Judgment. Juſtice *Heath*: the cuſtom is good both for the matter and form of it; where it was objected, that for a perſonal injury done by one, the cattle of another cannot be diſtreined, I agree, that it is unjuſt that where *alius peccat alius plectitur*; but our caſe differs from that rule, for this was by cuſtom, for *Tranſit terra cum onere*, he who ſhall have the land ought to undergo the charge. Beſides, whereſoever a cuſtom may have a good

beginning, and *ex certa & rationabili causa*, it is a good cuſtom, *Bracton lib.* 1. *cap.* 3. But this might have a reaſonable ground at the beginning, for here the puniſhment is a qualification of the Law: for where by the Law the Copyhold-tenant is to forfeit his copyhold-tenement for waſte, either voluntary or permiſſive, now this penalty is abridged and made more eaſie, and therefore is very reaſonable, 43 *E.* 3. 5. & 44 *E.* 3. 13. cuſtom, that if a tenant be indebted to the Lord, that he may diſtrein his other tenants for it, is not good; but if it were for Rent, it ſhould be good, becauſe, it may be, the tenants at the firſt granted it to the Lord, 22 *H.* 6. 42. 12 *H.* 7. 15. & 35 *H.* 6. 35. cuſtom to ſell a diſtreſs is good, and yet it cannot be done but by Act of Parliament. And where it was objected that the amercement is perſonal, and therefore cannot extend to the Plaintiff; to that he anſwered, that it is not meerly perſonal, but by cuſtom (as aforeſaid) is now made a charge upon the Land, and therefore not meerly perſonal. Beſides, if the cuſtom in this caſe had been, that the Plaintiff for waſte ſhould forfeit his Copyhold-tenement, it had been reaſonable *à fortiori* in this caſe that he ſhall be only amerced: wherefore he concluded, that the cuſtom is good, and therefore that the avowant ſhould have judgment. *Bramſton* Chief Juſtice: that the cuſtom is good, and that he conceived to be clear. Firſt, he conceived that the cuſtom is reaſonable as to the Copy-tenant, for clearly by the Common Law, if he ſuffer, or do waſte, he ſhall forfeit his Copyhold, and therefore this cuſtom is in mitigation of the penalty; and therefore is reaſonable, and that is not denied; but the only doubt here is, whether the cuſtom to diſtrein the under-tenant for an amercement layed upon the tenant be a good cuſtom or not: and he conceived it is, for the cuſtom which gives the diſtreſs knits it to the Land, and therefore not meerly perſonal as it was objected. And if the cuſtom had not extended to the under-tenant, he might have diſtreined him, for otherwiſe the Lord by ſuch deviſe as there is, *viz.* by the making of a Leaſe for one year by the Tenant ſhould be defeated of his ſervices, 3 *Eliz. Dyer* 199. reſolved, cuſtom

to

to ſeiſe the cattle of a ſtranger for a Heriot is not good, becauſe that thereby the property is altered. But cuſtom that he may diſtrein the cattle of a ſtranger for a Heriot is a good cuſtom, becauſe the diſtreſs is only as a pledge and means to gain the Heriot: and in our caſe the Land is charged with the diſtreſs, and therefore the cattle of any one which come under the charge may be diſtreined for it, and therefore he held clearly that the cuſtom was good, and that the avowant ſhould have Judgment. Juſtice *Barckley* at this time was impeached by the Parliament of High Treaſon.

232. A man was indicted for murder in the County Palatine of *Durham*, and now brought a *Certiorare* to remove the Indictment into this Court; and it was argued by *Keeling* at the Bar, that *Br' Domini Regis de Certiorare non currit in Com' Palatinum*. But the Juſtices there upon the Bench, *viz. Heath* and *Bramſton*, ſeemed ſtrongly to incline, that it might go to the County-Palatine; and they ſaid, that there were many preſidents in it: and Juſtice *Heath* ſaid, that although the King grant *Jura Regalia*, yet it ſhall not exclude the King himſelf; and he ſaid, their power is not independent, but is corrigible by this Court, if they proceed erroneouſly; and he ſaid, that in this caſe the party was removed by *Habeas corpus*, and by the ſame reaſon that a *Habeas corpus* might go thither, a *Certiorare* might: for which cauſe it was awarded, that they return the Writ of *Certiorare*, and upon the return they would debate it.

Hillary 17° Car' *in the Common Pleas.*

Layton *againſt* Grange *in a ſecond deliverance.*

233. JOhn *Layton* brought a ſecond deliverance againſt *Anthony Grange*, and declared of taking of certain Cattle in a place called *Nuns-field* in *Swaffam-Bulbeck*, and detainer of them againſt gages and pledges; &c. The defendant made conuſance as Bayliff to *Thomas Marſh*, and ſaid, that long time before the taking alledged, one *Thomas Marſh* the father of the Plaintiff was ſeiſed of the Mannor of *Michel-Hall* in *Swaffam-Bulbeck* aforeſaid, of which the Land in which time out of mind, &c. was parcel, and that one *Anthony Cage* and *Dorothy* his wife, and *Thomas Grange* and *Thomaſine* his wife were ſeiſed of the Land in which, &c. as in the right of the ſaid *Dorothy* and *Thomaſine* their wives in demeſne as of fee, and that they held the Land in which, &c. as of his Mannor of *Michel-Hall*, by ſoccage, *viz.* fealty; and certain Rent payable at certain days, and that the ſaid *Thomas Marſh* was ſeiſed of the ſaid ſervices by the hands of the ſaid *Anthony Cage* and *Dorothy* his wife, *Thomas Grange* and *Thomaſine* his wife, as by the hands of his very Tenants, and he derived the Tenancie to one Sir *Anthony Cage*, and the Seigniory to *Thomas Marſh* the ſon, by the death of the ſaid *Thomas Marſh* the Father, and becauſe that fealty was not done by Sir *Anthony Cage*, he as Bayly of the ſaid *Thomas Marſh* the ſon did juſtifie the taking of the ſaid cattle, *ut infra feodum & dominium ſua*, &c. The Plaintiff by Proteſtation ſaid, that *Non tenet* the Lands aforeſaid of the ſaid *Thomas Marſh*, as of his Mannor of *Michel-Hall* in *Swaffam-Bulbeck* aforeſaid by ſoccage, *viz.* fealty and rent, as aforeſaid, and *pro placito* ſaid, that the Defendant took the cattle as aforeſaid and detained them againſt gages and pledges, and then traverſed, *Abſque hoc*, that the ſaid *Thomas Marſh* the Father was ſeiſed of the ſaid ſervices by the hands of the ſaid *Anthony Cage* and *Dorothy* his wife, and *Thomas Grange* and *Thomaſine* his wife, as by the

the hands of his very Tenants: upon which the defendant did demur in Law, and ſhewed for cauſe of demurrer, that the Plaintiff had traverſed a thing not traverſable; and if it were traverſable, that it wanted form, and this Term this Caſe was debated by all the Judges, and it was reſolved by them all, that the Traverſe as it is taken, is not well taken. Juſtice *Foſter*, that the Traverſe taken by the Plaintiff is not well taken at the Common Law, the Lord was bound to avow upon a perſon certain; but now by the Statute of 21 *H.*8. *cap.*19. he may avow upon the Land, and this avowry clearly is an avowry upon the Statute, for it is *infra feodum & dominium ſua, &c.* and ſo is the old Entries 565. then the Queſtion here is, whether the Plaintiff be privy or a ſtranger; for if he be a ſtranger, then clearly at the Common Law he may plead no plea, but out of his Fee, or a Plea which doth amount to ſo much, as appeareth by the Books, 2 *H.*6 1.17 *E.* 3. 14, & 15. 34 *E.*3 Avowry 257. and many other Books as you may find them cited in the 9 *Rep.*20. in the caſe of Avowry, & here it doth not appear but that the Plaintiff is a ſtranger, and therefore whether he be inabled by the Statute of 21 *H.* 8. to take this traverſe or not, is the Queſtion: and I conceive that he is: true it is, as it was objected, that this Statute was made for the advantage of the Lord, but I conceive, as it ſhall enable the Lord to avow upon the Land, ſo it ſhall enable the Tenant to diſcharge his poſſeſſion, as if the avowry were upon the very tenant, and ſo is the Inſtitutes 268 *b.* and ſo is *Brown* and *Goldſmiths* caſe in *Hobarts Rep.* 129. adjudged in the point, and the Plaintiff here who is a ſtranger is in the ſame condition, as a ſtranger was at the Common Law, where the Avowry was made upon the Land for a Rent-charge, in ſuch caſe he might have pleaded any diſcharge although he were a meer ſtranger, and had nothing in the Land, ſo may he now after the *Stat.* of 21 *H.*8. Then admitting that the Plaintiff might take this Traverſe by the Statute; then the Queſtion is whether the Plaintiff hath taken a ſufficient Traverſe by the Common Law or not: for the Statute ſaith, that the Plaintiff in the Replevin or ſecond deliverance ſhall have the like Pleas

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as at Common Law, and I conceive that this plea is not a good plea at the Common Law. And now I will consider whether if the Plaintiff had been a very Tenant, he might have pleaded this plea or not; and I conceive that if this traverse had been taken by a very tenant, it had not been good. I agree the 9 *Rep.* 35 *Bucknels* case, that *Ne unqs seisie* of the services generally is no good plea, but *Ne unqs seisie* of part of the services is a good plea; and so is 16 *E.* 4. 12. & 22 *H.* 6. 3. and the reason that the first Plea is not good, is because that thereby no remedy is left to the Lord, neither by avowry, nor by writ of customs and services. And therefore the plea here is not good, because it is a traverse of the services generally. Besides, here the traverse is not good, because that the Plaintiff hath traversed the seisin, and hath not admitted the tenure: and it is a rule in Law, that no man may traverse the seisin of services, without admitting a tenure; and therewith agreeth 7 *E.* 4. 28. 20 *E.* 4. 17. & 9 *Rep. Bucknells* case; and then if the very tenant could not have taken this traverse, much less a stranger here. Further, here the tenure was alledged to be by rent and fealty, and the avowry was for the fealty, and the Plaintiff hath traversed the seisin as well of the rent which is not in demand, as of the fealty, and therefore the traverse is not good. But it was objected, that seisin of rent is seisin of fealty, and therefore of necessity both ought to be traversed. I agree, that seisin of rent is seisin of fealty, but it is no actual seisin of the fealty in point of payment, or to maintain an assise for it, as is 44 *E.* 3. 11. & 45 *E.* 3. 23. and the distress here is for actual seisin of fealty. Every traverse ought to be *adidem*, as 26 *H.* 8. 1. & 9 *Rep.* 35. but here the traverse is of the Rent which is not in question, & therefore is not good in matter of form. Wherefore he gave Judgment for the avowant. Justice *Reeve*: the first thing here considerable is, whether this be a conusance at the Common Law, or upon the Statute; and I hold clearly that it is within the Statute; and for that see new *Entries* 597 & 599. & 27 *H.* 8. 20. and it is clear that the Lord hath Election either to avow upon the Statute, or at the Common Law; and that is warranted by *Institutes* 268.

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and 312. 9 *Rep.* 23. *b.* 36. *a.* & 136. *a.* and then admitting, that it be an avowry upon the Statute. The ſecond point is, whether the Plaintiff be inabled by the Statute to take this traverſe or not, for it is clear, that at the Common Law the Plaintiff could not have this Plea, for a ſtranger could not plead any thing, but *hors de ſon fee*, or a plea which did amount to as much. I agree the Books of *Br.* Avowry 113. & 61. & 9 *Rep.* 36. & 27 *H.* 8. 4. & 20. & *Br.* Avowry 107. & *Inſtit.* 268. which are againſt me; yet I conceive under favour, that notwithſtanding any thing that hath been ſaid, that the Plaintiff is not enabled by the Statute to take this traverſe; and I ground my Opinion upon the Reaſon at Common Law, as alſo upon the Statute; the firſt reaſon at the Common Law, I ground upon the Rule in Law, *res inter alios actæ, alteri nocere non debet*, it is not reaſon that he who is a ſtranger ſhall take upon himſelf to plead to the Title of the Tenure, with which he hath nothing to do in prejudice of the very Tenant, and this reaſon is given by the Books of 22 *H.* 6. & 39 *E.* 3. 34. My ſecond reaſon is grounded upon the maxime in Law, which is, That in pleading every man ought to plead that which is pertinent for him and his Caſe. And that's the reaſon that the Incumbent at the Common Law cannot plead to the right of the Patronage wherein he hath nothing, but the Patron ſhall plead it, as appeareth by the 7 *Rep.* 26. and many other Books there cited; and theſe are my reaſons at the Common Law, wherefore the Plaintiff being a ſtranger cannot plead this Plea. Secondly, I ground my ſelf upon the purview of the Statute to prove that the Plaintiff cannot plead this plea, the words of which are, *That the Plaintiffs ſhall have ſuch Pleas and Aid-prayers as at the Common Law*: and if the Plaintiff could have pleaded this Plea by the Statute, the Statute would not have enacted that there ſhould be the like Aid-prayers as at the Common Law, for if the Plaintiff might plead this plea, then there need not any Aid-prayer; and as at the Common Law no Aid-prayer was grantable of a ſtranger to the avowry, ſo neither is it ſo now; and to prove that he cited 27 *H.* 8. 4. 19 *Eliz.* New *Entries* 598. & 26 *H.* 8. 5. againſt the Inſti-

tutes, 312. a. Beſides, the Statute gives the like pleas as at the Common Law, and therefore no new pleas, and that cauſed me to give thoſe reaſons before at the Common Law: and if this ſhould be ſuffered, every wrangler by putting in of his cattle, ſhould put the Lord to ſhew his title, which would be a great prejudice to him. The Statute of 25 *E.* 3. *c.* 7. enables the poſſeſſor to plead to the title of the Patronage, and that it is not till induction if it be againſt a Common perſon, which he ought to ſhew, otherwiſe he is not inabled to plead to the title, as it is in the 7 *Rep.* 26. *a.* & *Dyer fol.* 1. *b.* But note, there the Statute enables him to plead to the title; which is not ſo in our Caſe, the general words of the Statute of *Weſt.* 2. have always received conſtruction at the Common Law, as appeareth by 18 *E.* 3. 3. 10. 22 *E.* 3. 2. & 9 *Rep. Bucknells* caſe, and 11 *Rep.* 62, 63. there you may ſee many Caſes cited which have the like words of reference to the Common Law, as the Statute in that Caſe, and there always they have received conſtruction by the common Law: the Authorities cited before againſt me, are not againſt me, for they ſay that the Plaintiff after this Statute may have any anſwer which is ſufficient, ſo clearly by theſe authorities the anſwer ought to be ſufficient, and that is the queſtion in our Caſe, Whether the anſwer be ſufficient or no, which as I have argued, it is not; becauſe the Plaintiff is not enabled to take this traverſe by the Common Law; and the Statute doth not give any other Plea than at the Common Law. 26 *H.* 8. 6. is expreſs in the point, That the Plaintiff being a ſtranger, is not enabled by this Statute to meddle with the tenure; wherefore I conceive that the Plaintiff is not a perſon ſufficient within the Statute to take this traverſe without taking ſome eſtate upon him, as in fee for life or years, *&c.* But for the latter point, admitting that the Plaintiff were enabled by the Statute to take this traverſe; yet I hold clearly, that as this caſe is, he hath not purſued the form of the common Law in the taking of it: and I agree the rule that the Plantiff cannot traverſe the ſeiſin without admitting of a tenure, and therefore the traverſe here is not good, becauſe he takes all the tenure by proteſtation. Beſides, I agree that traverſe of ſeiſin

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generally is not good, 9 *Rep. Bucknells* caſe; and I agree that traverſe of ſeiſin *per manus* is not good without confeſſing the tenure for part: and here he takes all the tenure by proteſtation, and therefore not good, 18 *E.* 2. *Fitz. Avowry* 217. is expreſs in the point that the traverſe is not good. Wherefore I conclude that Judgment ought to be given for the avowant. Juſtice *Crawley*, that Judgment ought to be given for the avowant; he held clearly that the avowry is within the Statute, and that being within the Statute the Plaintiff is enabled to take this traverſe, and that he grounded upon the Books of 34 *H.* 8. *Br.* Avowry 113. 24 *H.* 4. 20. 9 *Rep.* 36. and *Hobarts Rep.* 129. *Brown* and *Goldſmiths* Caſe. Then he being inabled by this Statute to take this plea as a very tenant, the Queſtion is, Whether the Traverſe here *per manus* be good or not, and he held not; but he ought to have traverſed the tenure as this Caſe is: that the traverſe of the ſeiſin *per manus* generally is not good, I ground me upon the 9 *Rep. Bucknells* Caſe 35. *a.* and I agree the third rule there put, that *Ne unq; ſeiſie per manus* is a good plea, but that muſt be intended where the Plaintiff confeſſeth part of the tenure, which he hath not done in this Caſe, as it appeareth by the fourth rule there taken, which is an exception out of the precedent rule, upon which I ground my opinion, and therefore the traverſe here is not good. Beſides, Homage and Fealty are not within the Statute of Limitations, and therefore not traverſable: and if it ſhould be permitted, the rule in *Bevills* Caſe 4 *Rep.* 11, 12. and *Com.* 93. *Woodlands* Caſe, which reſolve that they are not traverſable, ſhould be by this means quite defeated. Further, in this Caſe the fealty only is in demand, and the Plaintiff hath traverſed the ſeiſin of the rent as well as of the fealty, which is not good. I agree the Book in the 9 *Rep. Bucknells* Caſe *fol.* 35. that ſeiſin is not traverſable but only for that for which the avowry is made, if not that ſeiſin be alledged of a ſuperior ſervice (for which the avowry is not) which by the Law is ſeiſin of the Inferiour ſervice, with which agrees 26 *H.* 8. 1. & 21 *E.* 4. 64. But in our Caſe ſeiſin is not alledged of a ſuperiour ſervice, for which the avowry is not made but of

an inferiour, *viz.* of a rent which is inferiour to fealty (as the Books are of 21 *E.* 3. 52. Avowry 115. and 19 *E.* 4. 224.) and which of right ought to be ſo, unleſs a man eſteem and value his money above his conſcience; and therefore the traverſe of the rent which is inferior ſervice and not in demand, is not good. Beſides, you cannot traverſe the ſeiſin of the fealty without the traverſe of the ſeiſin of the rent, becauſe the ſeiſin of rent is the ſeiſin of fealty, and the rent is not here in demand, and therefore not traverſable, and therefore you ought to have traverſed the tenure; for although it be ſaid, that rent which is annual is inferiour to all other ſervices, 4 *Rep.* 9 *a.* yet it is reſolved that the ſeiſin of rent is ſeiſin of all other ſervices: further, I conceive that if you avow for one thing, you need not to alledge ſeiſin of other ſervices. 24 *E.* 3. 17. & 50. ſeemeth to croſs the other authorities before cited; but I believe the latter authorities. Wherefore I conclude that Judgment ought to be given for the avowant. *Banks* Chief Juſtice: I conceive that it is a plain avowry upon the Statute, and therefore I need not to argue it; here are two Queſtions only. The firſt, Whether this Plaintiff, who is a ſtranger, be enabled by the Statute of 21 *H.* 8. to plead in Bar of this conuſance or not. Secondly, admitting that he be inabled by the Statute to plead this plea, whether the traverſe be here well taken or not. To the firſt, I hold that he is inabled by the Statute to take this traverſe: but for the ſecond, I hold clearly, that the traveſe is not well taken: here the Plaintiff and Defendant are both ſtrangers, ſo as here is neither the very Lord nor the very Tenant. And now I will conſider what the Common Law was before the Statute, it is clear that by the Common Law a ſtranger might plead nothing in diſcharge of the Tenancie, nor could plead a releaſe, as the Books are 34 *E.* 3. Avowry 257. and 38 *E.* 3. Avowry 61. he could not plead *rien arrere*, or levied by diſtreſs, he could plead no Plea but *hors de ſon fee*, or a Plea which did amount to ſo much. I confeſs that the Book of 5 *E.* 4. 2. *b.* is that the Tenant in a Replevin could not plead *hors de ſon fee*, but the Book of 28 *H* 6. 12. is againſt it. True it is, that in ſome ſpecial Caſe, as where there is Covin or Colluſion

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in the avowant, there the Tenant ſhall ſet forth the ſpecial matter, as it is in 9 *Rep.* 20. *b.* Now there are two Reaſons given in our Books, wherefore the Plaintiff in a Replevin being a ſtranger, could not plead in Bar of the Avowry. The firſt is, that the Seignory being in queſtion, it is matter of privity betwixt the Lord and the Tenant. The ſecond, that the Law doth allow unto every man his proper plea, which is proper to his Caſe, and that he ought to plead and no other, as appeareth by the Books, 12 *Aſſ.* p. 2. 13 *H.* 8. 14. 2 *H.* 7. 14. 13 *H.* 7. 18. *Lit.* 116. 35 *H.* 6. 13. & 45 *E.* 3. 24. Now ſeeing that the Plaintiff being a ſtranger could not plead this Plea at the Common Law, the Queſtion now is, Whether he be inabled by the Statute to take this Plea or not; the words of the Statute are, *That the Plaintiff and Defendant ſhall have the like Pleas and Aid-prayer as at the Common Law*; and therefore it was objected that it doth not give any new Plea; true it is, that by the expreſs words thereof that it gives not any new Plea, but yet I conceive that any ſtranger is enabled to plead any plea in diſcharge of the Conuſance by the equity of this Statute; at the Common Law avowry was to be made upon the perſon, and therefore there was no reaſon that the Plaintiff being a ſtranger ſhould plead any thing in Bar of the Avowry or Conuſance, but now the Statute enables the Lord to avow upon the Land, not naming any perſon certain, it is but juſtice and equity that the Plaintiff ſhould be inabled to plead any thing in diſcharge of it. I compare this Caſe to the Caſe in the 3 *Rep. fol.* 14. *Harberts* Caſe, where it is reſolved that feoffee of a Conuſor of a Statute being only charged, may draw the other in to be equally charged; and if execution be ſued againſt him only, that he may diſcharge himſelf by *Audita querela* for ſo much. 8 *E.* 4. 23. *a.* there the Defendant avowed for a rent-charge, the Plaintiff ſhewed how that one *E.* leaſed the Land to him and prayed in aid of him, and reſolved that he ſhould not have aid becauſe the avowry is for Rent-charge, ſo as the Plaintiff might plead any plea that he would in diſcharge of the land; now by the ſame reaſon, where the lands of the Plaintiff were charged with a rent-charge, he might at the common

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Law have pleaded any thing in diſcharge of his land; by the ſame reaſon where there is an avowry upon the Land according to the Statute, the land being charged, the Plaintiff may plead any thing in diſcharge thereof; and this is my firſt reaſon. My ſecond reaſon is, that this Law hath been conſtrued by equity, for the benefit of the Lord, and therefore it ſhall be conſtrued by equity for the benefit of the Tenant alſo, *Inſtit.* 286. *b.* My third reaſon is, Although the Plaintiff be a ſtranger and claimeth no intereſt in the Land, yet for the ſaving of his goods he may juſtifie this plea; I may plead an aſſault upon another who endeavoreth to take away my goods, and I may juſtifie maintenance where it is in defence of my intereſt, as it appeareth in 15 *H.* 7. 2. and 34 *H.* 6. 30. Fourthly and laſtly, upon the authorities in Law after the making of this Statute, I conceive that the Plaintiff may well take the Plea, 27 *H.* 8. 4. The plaintiff prayed in aid of a ſtranger and had it, which could not be at the Common Law, as appeareth by 3 *H.* 54. and 34 *H.* 6. 46. and many other Books; and for Books in the point, 34 *H.* 8. *Petty Brooke* 235. *Inſtitutes* 268. 9 *Rep.* 36. *& Hobarts rep.* 150, 151. *Brown* and *Goldſmiths* Caſe: wherefore I hold that the Plaintiff may by the equity of the Statute plead this plea. But it was objected by my brother *Reeve*, that by the Statute of 25 *E* 3. *c.* 7. It is enacted that the poſſeſſor ſhall plead in Bar, and therefore the incumbent before induction cannot plead in Bar, as it is reſolved in 4 *H. Dyer* 8. 1. and 31 *E.* 3. *Incumbt.* 6. and upon the ſame reaſon he conceived it ſhould be hard in our Caſe, that the Plaintiff who is but a ſtranger, not taking upon him any eſtate, ſhould be admitted to plead this plea; eſpecially the Statute in this Caſe ſaying, that the Plaintiff ſhall have the like pleas as at the Common Law: To that I anſwer, that by the Statute of 25 *E.* 3. it is enacted that the poſſeſſor ſhall plead in Bar, and therefore clearly there he ought to ſhew that he is poſſeſſor: otherwiſe he cannot plead in Bar, and therefore not like to our Caſe: and the Novel *Entries* 598, 599. doth not make againſt it, for there it was not upon the Statute; and 26 *H.* 8. 6. is expreſs that the Plaintiff being a ſtranger

ſtranger is enabled by the Statute of 21 *H.* 8. to take this plea: Wherefore I conclude this point, that the Plaintiff is inabled by the Statute to plead any thing in Bar of the avowry: But for the ſecond point, I hold clearly that the traverſe as it is here taken is not well taken, it is only an equitable conſtruction that the Plaintiff ſhall plead this plea, as I have argued before, and therefore he ought to purſue the form of the Common Law, in the form of his traverſe, which he hath not here done, and therefore the traverſe is not good, and where the ſeiſin is not material, there it is not traverſable, and in this Caſe the ſeiſin of the fealty is not material, for it is out of the Statute of Limitations, and therefore not traverſable: and ſo is it in the Caſe of a gift in tail, and grant of a Rent-charge, it is not traverſable, becauſe that the ſeiſin is not material, 7 *E.* 4. 29. *Com.* 94. 8. *Rep.* 64. *Foſters* Caſe. Secondly where the Seigniory is not in queſtion, there no traverſe of ſeiſin, ſo it is in Caſe of Writ of Eſcheat, *Ceſſavit Reſcous*, &c. and therewith agree the Books of 22 *H.* 6. 37. 37 *H.* 6. 25. & 4. *Rep.* 11. *a. Bevills* Caſe. Thirdly, where the Lord and Tenant differ in the ſervices, there no traverſe of the ſeiſin but of the tenure, but where they agree in the ſervices, there the ſeiſin may be traverſed, and therewith agree the Books of 21 *E.* 4. 64. & 84. 20 *E.* 4. 17. 22 *Aſſ. p.* 68. & 9 *Rep.* 33. *Bucknells* Caſe; and therefore the traverſe here is not good. Firſt, becauſe it is a general traverſe of the ſeiſin *per manus*, the tenure not being admitted as it ought to be by the fourth rule in *Bucknells* Caſe, and therewith agreeth 23 *H.* 6. Avowry 15. Beſides, it is a Rule in Law, That a man ſhall never traverſe the ſeiſin of ſervices, without admitting of a tenure, and in this Caſe he took the tenure by proteſtation; and therefore the traverſe here is not good, and therewith agrees 15 *E.* 2. Avowry 214. Further, the traverſe here is not good, becauſe he hath traverſed a thing not in demand, which is the rent, for he ought to have traverſed the ſeiſin of the fealty only for which the diſtreſs was taken, and not the rent as here he hath done, and therewith agreeth 9 *Rep.* 35. *a.* and 26 *H.* 8. 1. But as this Caſe is, he could not traverſe the fealty only be-

becauſe that ſeiſin of rent is ſeiſin of fealty, and therewith agreeth 13 E.3. Avowry 103. 3 E.2. Avowry 188. & 4 *Rep.* 8. *b. Bevills* Caſe, and therefore he ought to traverſe the tenure. True it is, as it was objected by my Brother *Foſter*, that ſeiſin of Rent is not an actual ſeiſin of fealty as to have an aſſiſe, but is a ſufficient ſeiſin as to avow. And we are here in Caſe of an avowry, and therewith agreeth the 4 *Rep.* 9. *a. Bevills* Caſe: wherefore I conclude that Judgment ought to be given for the avowant. Here note, that it was reſolved by all the Judges of the Common Pleas, that a traverſe of ſeiſin *per manus* generally without admitting of a tenure is not good, and therefore ſee 9 *Rep.* 34. *b.* & 35. *a.* which ſeemeth to be contrary.

Hill. 17° Car. *in the Kings Bench.*

Hayward *againſt* Duncombe *and* Foſter.

234. THE Caſe was thus: The Plaintiff here being ſeiſed of a Mannor with an advowſon appendant, granted the next avoidance to *I. S.* and afterwards bargained and ſold the Mannor with the advowſon to the Defendants *D.* and *F.* and a third perſon, and covenanted with them that the Land is free from all incumbrances. Afterwards the third perſon releaſed to the Defendants, who brought a writ of Covenant in the Common Pleas, and there Judgment was given that the Action would lie. Whereupon *Hayward* brought a Writ of Error in this Court. The point ſhortly is this, Whether the Writ of covenant brought by the Defendants without the third perſon who releaſed were good or not; and that reſts only upon this, Whether this Action of covenant to which they were all intitled before the releaſe, might be transferred to the other Defendants only by the releaſe or not. And it was objected, that it could not, becauſe it is a thing in Action, and a thing veſted

veſted which cannot be transferred over to the other two only by the releaſe; but that all ought to joyn in the Action of covenant notwithſtanding. *Rolls* contrary, becauſe that after this releaſe it is now all one as if the bargain and ſale had been made to thoſe two only, and now in an Action brought againſt them two, they may plead a feoffment made to them only, without naming of the third who releaſed, and ſo it is reſolved in 33 *H.* 6. 4, & 5, & 6 *Rep. fol.* 79. *a.* Beſides this covenant here is a real covenant, and ſhall go to aſſignees, as it is reſolved in 5 *Rep. Spencers* Caſe; and here is as violent relation as if the feoffment had been made to them two only. It was objected by Juſtice *Heath*, What if the other died? It was anſwered, perhaps it ſhall there ſurvive, becauſe that it is an Act in Law, and the Law may transfer that which the Act of the party cannot, becauſe that *Fortior eſt diſpoſitio legis quam hominis*, &c.

Booremans *Caſe.*

235. *Booreman* was a Barriſter of one of the Temples, and was expelled the houſe, and his Chamber ſeiſed for non-payment of his Commons, whereupon he by *Newdigate* prayed his writ of reſtitution, and brought the writ in Court ready framed; which was directed to the Benchers of the ſaid Society: but it was denied by the Court, becauſe there is none in the Inns of Court to whom the writ can be directed, becauſe it is no body corporate, but only a voluntary Society, and ſubmiſſion to Government; and they were angry with him for it, that he had waived the ancient and uſual way of redreſs for any grievance in the Inns of Court, which was by appealing to the Judges, and would have him do ſo now.

Bambridge *againſt* VVhitton *and his wife.*

236. IN an *Ejectione firme* upon *Not Guilty* pleaded, a ſpecial Verdict was found, & the caſe upon the ſpecial verdict

this; A Copyhold Tenant in fee doth ſurrender into the hands of two Tenants, unto the uſe of *J. W.* immediately after his death, and whether it be a good ſurrender or no, was the queſtion. *Harris*: that the ſurrender is void. Eſtates of Copyholds ought to be directed by the rule of Law, as is ſaid in 4 *Rep.* 22. *b.* 9 *Rep.* 79. & 4 *Rep.* 30. And as in a grant, a grant to one in *ventre ſa mier* is void, ſo alſo in a will or deviſe, and as it is reſolved in *Dyer* 303. *p.* 50. ſo it hath been adjudged that the ſurrender to the uſe of an Infant *in ventre ſa mier* is void: and as at Common Law a Freehold cannot begin in *futuro*, ſo neither a Copyhold, for ſo the ſurrenderer ſhould have a particular eſtate in him without a donor or leſſor, which by the rule of Law cannot be: and he took a difference betwixt a Deviſe by Will, & a Grant executed; in a deviſe it may be good, but not in a grant executed: and here he took a difference where the Grant is by one intire clauſe or ſentence, and where it is by ſeveral clauſes, 32 *E.* 1. *taile* 21. *Dyer* 272. *p.* 30. *Com.* 520. *b.* 3 *Rep.* 10. *Dowties* Caſe, and 2 *Rep. Doddingtons* caſe. For inſtance, I will put only the Caſe in *Dyer* and the *Comment*. A Termor grants his Term *habendum* after his death, there the *Habendum* only is void, and the grant good; but if he grant his Term after his death, there the whole grant is void, becauſe it is but one ſentence: So I ſay in our Caſe, becauſe it is but one clauſe, the whole grant is void. Another difference is, where the diſtinct clauſe is repugnant and where not; where it is repugnant there it is void and the grant good, *quia utile per inutile non vitiatur*: But in our Caſe as I have ſaid before it is one intire ſentence, *M.* 13. or 23 *Jac.* in this Court, *Rot.* 679. *Sympſon* and *Southwells* Caſe, the very Caſe with our Caſe. There was a ſurrender of a Copy-tenant to the uſe of an Infant *in ventre ſa mier* after the death of the ſurrenderor, and there it was reſolved by all the Judges except *Doddridge* that the ſurrender was void, Firſt, becauſe it was to the uſe of an Infant *in ventre ſa mier*, and Secondly, becauſe it was to begin *in futuro*, which is contrary to the rule in Law: and Copy-tenants as it was there ſaid, ought to be guided by the rules of Law: but *Doddridge* doubted of it, and he agreed the

2. Bulst. 274.
2. Cro. 376.

Caſe

Caſe at Common Law, that a freehold could not commence *in futuro*, but he doubted of a Copyhold; and he put the Caſe of ſurrender to the uſe of a Will: But he ſaid, that Judgment was afterwards given by *Coke* Chief Juſtice in the name of all the other Judges that the ſurrender was void, and therefore *Quod querens nihil capiat per billam*, wherefore he concluded that the ſurrender was void, and prayed the Judgment of the Court.

Langhams *Caſe*.

237. LAngham a Citizen and Freeman of *London* was committed to *Newgate* by the Court of Aldermen, upon which he prayed a *Habeas corpus*, which was granted, upon which return was mane, Firſt, it is ſet forth by the return, that *London* is an ancient City and Incorporate by the name of Mayor, Comminalty and Citizens, and that every Freeman of the City ought to be ſworn, and that a Court of Record had been held time out of mind, &c. before the Mayor and Aldermen. And that there is a cuſtom, that if any Freeman be elected Alderman, that he ought to take an Oath *cujus tenor ſequitur in hæc verba, viz. You ſhall well ſerve the King in ſuch a Ward in the Office of Alderman of which you are elected, and you ſhall well intreat the people to keep the Peace and the Laws and Priviledges within and without the City: you ſhall well obſerve and duly you ſhall come to the Court of Orphans and Huſtings if you be not hindred by Command of the King, or any other lawful cauſe: you ſhall give good counſel to the Mayor: you ſhall not ſell Bread, Ale, Wine, or Fiſh by retail*, &c. Then is ſet forth a cuſtome, that if any perſon be choſen Alderman, he ſhall be called to the Court, and the Oath tendred to him, and if he refuſe to take it, then he ſhall be committed, until he take the Oath. Then is ſet forth, that by the Statute of 7 *R.* 2. all the cuſtoms of the City of *London* are confirmed. And laſtly, is ſet forth that the 11 of *Jan. Langham* being a freeman of *London*, and having taken the Oath of a free-

man was *debito modo electus* Alderman of *Portſoken-ward*, and being *habilis & idoneus* was called the firſt of *February* to the Court of Aldermen, and the Oath tendred to him, and that he refuſed to be ſworn *in contemptum Curiæ, & contra conſuetudines, &c.* wherefore according to the cuſtom aforeſaid, he was committed by the Court of Aldermen to *Newgate*, until he ſhould take the Oath, *& hæc fuit cauſa &c.* To this retorn many exceptions were taken. *Maynard:* the retorn is inſufficient for matter and form; for form it is inſufficient, for the *debito modo electus*, without ſhewing by whom and how, is too general: then it is inſufficient for the matter, for he is impriſoned generally, and not until he takes the Oath, which utterly takes away the liberty of the ſubject, for by this means he may be impriſoned for ever. Beſides, here is no notice given to him that he was choſen Alderman, but they elect him, and then tender him the Oath, without telling him that he was choſen Alderman, and therefore the retorn not good, for it ought to be certain to every intent. Further, the Oath is naught and unreaſonable, for he ought to forſwear his Trade, for if he ſell Bread, Ale, Wine, or Fiſh before, now he muſt ſwear that he ſhall never ſell them by retail after, which is hard and unreaſonable, for perhaps he may be impoveriſhed after, and ſo neceſſitated to uſe his Trade, or otherwiſe periſh; wherefore for theſe reaſons he conceived that the Retorn was inſufficient. *Glynn* upon the ſame ſide, that the Retorn is inſufficient, and he ſtood upon the ſame exceptions before, and he conceived, that notice ought to be given to him that he was choſen Alderman, for this reaſon, becauſe of the penalty which he incurs, which is impriſonment; and he compared it to the Caſes in the 5 *Rep.* 113. *b.* & 8 *Rep.* 92. That the feoffee of Land or a Bargain of a reverſion by Deed indented and inrolled ſhall not take advantage of a condition for not payment of Rent reſerved upon a leaſe upon a demand by them without notice given to the leſſee for the penalty which inſues of forfeiture of his Term. So in our Caſe, he ſhall not incur the penalty of impriſonment for refuſing to be ſworn, without notice given him that he was choſen Alderman. He took another

nother exception to the Oath, becauſe he is to ſwear, that he ſhall obſerve all Laws and Cuſtoms of the ſaid City generally, which is not good; for that which was lawful before, peradventure will not be lawful now; for ſome Cuſtoms which were lawful in the time of *R.* 2. are now ſuperſtitious, and therefore are not to be kept. Further, it is to keep all the cuſtoms within and without the City, which is impoſſible to do. Wherefore for theſe reaſons he conceived the Retorn not to be good, and prayed that the priſoner might be diſcharged. *Saint-John* Sollicitor of the ſame ſide. The cuſtom to impriſon is not good. Beſides, here the impriſonment is general, ſo that he may be impriſoned for ever, which is not good; and the Statute confirms no cuſtoms but ſuch as are good cuſtoms: I agree that a cuſtom for a Court of Record to fine, and for want of payment to impriſon may be good, becauſe the cuſtom goes only to fine and not to impriſonment; the Caſe of 1 *H.* 7. 6. of the cuſtom of *London* for a Conſtable to enter a houſe and arreſt a Prieſt, and to impriſon him for incontinencie comes not to our Caſe, for that is for the keeping of the peace, which concerns the Commonwealth, as it is ſaid in the Book, and therefore may be good: but it is not ſo in our Caſe. A Corporation makes an ordinance, and injoyns the obſervance of it under pain of impriſonment, it hath been adjudged that the Ordinance is againſt the Statute of *Magna Charta*, that *Nullus liber homo impriſonetur*, &c. and therefore naught: and that is the 5 *Rep.* 64 *a. Clarkes* Caſe, and therewith agrees the caſe of the City of *London*, 8 *Rep.* 127. *b. Mich.* 14 & 15 *Eliz. Marſhalls* Caſe in *Harpers Reports*, there a *Habeas corpus* was directed to the Mayor of *Exeter*, who returned a cuſtom there that none but a freeman ſhould ſet up a ſhop there, and if any other did, that he ſhould be impriſoned, and it was adjudged no good cuſtom, *Mich.* 21 E. 1. in the Common Pleas, *Rot.* 318. upon a *Habeas corpus* the cuſtom of *Cambridge* was retorned, which was that the Vice-chancellor might impriſon a Scholar taken in a ſuſpicious place, I conceive the ſame no good cuſtom, but it is not reſolved. Beſides, I conceive the return here is inſufficient, becauſe that no notice

notice was given to the party that he was choſen Alderman, which I conceive ought to have been for the great penalty which follows, wherefore he prayed that the priſoner might be diſcharged. *White* of the ſame ſide; the retorn is not good for want of notice; and he ſaid, that it doth not appear that he was preſent at the election, and no other notice appeareth by the Retorn; and he ſaid, that the tender of the Oath did not imply notice: further he ſaid, that the Oath is not good, becauſe he is to abjure his Trade. Beſides, it is ſaid in the Retorn that the cuſtom is, That *Si aliquis liber homo* be elected Alderman, &c. and doth not ſay *habilis & idoneus*, as it ought to be, and therefore not good. True it is, that it is averred in the Retorn that he was *habilis & idoneus*, but it is not alledged to be part of the cuſtom, and therefore that doth not help it, wherefore he prayed that the priſoner might be diſcharged. *Gardiner*, Recorder for the City, that the Retorn is ſufficient; and firſt for the *debito modo electus*, where it was objected that the ſame was too general; to that he anſwered, that no traverſe can be taken upon it, and therefore it is ſufficient, for there is not ſuch certainty required in a Retorn upon a *Habeas corpus* as in pleading, as it is reſolved in the Caſe of the City of *London*, 8 *Rep.* 127. *b.* 128. *a.* and according to that it is reſolved in 9 *H.* 6. 44. *a.* where it is ſaid, that if the cauſe in it ſelf be ſufficient upon the Retorn, it ſufficeth although it be falſe; and although there be not ſo preciſe certainty in it, and there it is reſolved that the party cannot take iſſue upon the Retorn, and yet there is no prejudice by it, for if it be falſe you may have a Writ of falſe impriſonment, and therewith agrees 11 *Rep.* 99. *a. b. James Baggs* Caſe, and *Anne Bedingfields* Caſe, 9 *Rep.* 19. whereupon a *Ne unques accouple* in legal Matrimony pleaded, the Biſhop certified *quod infra nominat' E. & A. legitimo matrimonio copulati fuerunt*, to which Certificate (ſaith the Book) being brief and direct in the point, no exception was ever taken; and if a Retorn upon a *Habeas corpus* ſhould have all circumſtances, it would be ſo long and perplexing, that there would be no end of it: and he conceived the retorn ſufficient notwithſtanding

that

that Objection. Now for the exception that the Plaintiff had not notice of his election to be Alderman; to that he answered, that it appeareth clearly that he had notice, for it appeareth that the same day that he was elected, he was called to take the Oath, and that was tendred to him, and he refused to be sworn, which certainly implies that he had notice. For the exception that the Oath is unreasonable, because he was to abjure his Trade, which is in prejudice of the Commonwealth, from the using of which no man can bind himself, much less abjure against it: To that he answered, that notwithstanding that the Oath is lawful, and you forswear no more than the Law doth prohibit you, for it doth not extend to all Trades, but only to such as sell Bread, Ale, Wine and Fish; and it is against Law and Reason, that he who hath the Jurisdiction of Bread, Ale, &c. and may punish the misusage of it, that he should exercise the same Trade himself; wherefore he conceived that notwithstanding that exception the Return is sufficient. For the objection to the Oath that he ought to swear that he will keep all the priviledges of the City, whereas in truth there are many Priviledges which are now unlawful, although that before they were lawful, and therefore the same ought not to be kept; to that he answered, that the Oath is good notwithstanding that Objection, for it ought to be intended that he shall keep all priviledges and customs reasonable, which agree with the times in which we live, and not such as are superstitious and unreasonable. For the Objection, that the custom is unreasonable, because it trencheth much upon the liberty of the Subject, and against the Statute of *Magna Charta* that the body of a Freeman should be imprisoned, and the rather because here the imprisonment is general, and he may be imprisoned for ever; to that it was answered, that the City hath customs as unreasonable as in this case, as the custom in *L.* 5 *E.* 4. 30. 11 *H.* 6. 3. & 2 *H.* 4. 12. That the Creditor may arrest the Debtor before the day of payment to give better security, and that is altogether against the Rule of Law. Besides, they have a custom which you shall find in 1 *H.* 7. 6. and 2 *H.* 4. 12. That a Constable upon

on ſuſpition of incontinencie may enter the houſe of a ſtranger and arreſt the body of the offender and commit him to priſon, and that is a good cuſtom, and yet it is againſt the Law,& trencheth alſo upon the liberty of the Subject. Beſides, they have a cuſtom, that no perſon being not free of the City ſhall keep ſhop there, and that is adjudged a good cuſtom, although it be to reſtrain trading, which is againſt the rule of the Law alſo, 8 *Rep.* 125. The Caſe of the City of *London*. And for the objection that it is unreaſonable, becauſe that the impriſonment is general: to that he ſaid, it was a good objection if it were true, but that is miſtaken; for the return is expreſly that he ſhall be impriſoned until he hath taken the Oath, which is not general, for if he take the Oath he ſhall be diſcharged; and here he ſaid that this Government by Aldermen in this City is one of the moſt ancient Governments in the Kingdom, beyond time of memory, and is a Government which of neceſſity ought to be ſupported, or otherwiſe the City would immediately be brought to ruine, for we cannot hold a Court without thirteen Aldermen, which ought to have care of the Orphans, and make Laws for the well government of the City, and that is of great conſequence to all the Kingdom, and concerns the Government of it; and if this City be well governed, the whole Kingdom will fare the better; and at this time we want many Aldermen, and if theſe ſhall eſcape, by the ſame reaſon others will do ſo, and ſo the Government utterly ſhould fail. And where it was objected that it is uſual to make them to take the Oath, and accept a fine of them after: To that he ſaid, that they would not do ſo now in this Caſe; for he ſaid, that the party choſen is an able man, and a man whom they reſpect, and not his money: And therefore he ſaid that the cuſtom to impriſon him for refuſing is more reaſonable than if the cuſtom were to fine him; for he ſaid, that that Cuſtom is the moſt reaſonable cuſtom, which is moſt fit for the attaining of its end; and he ſaid, that impriſonment is moſt apt for the obtaining the end: for when we accept a fine, there is no end of it, for he may be choſen after; and how can the Government be ſupported

which

which is the end of the election if all ſhould be fined, wherefore the cuſtom to impriſon is more reaſonable, than if the cuſtom had been to fine; becauſe it is more apt to attain the end; which is to maintain the Government: it is ſaid in 38 *Aſſ. p.* 22 *Br.* Impriſonment 100. That it was reſolved 2 *Ma.* in Parliament, that impriſonment almoſt in all Caſes is but to detain him untill he makes a fine, and if he tender that to be diſcharged. To that he ſaid, that the ſame ought to be underſtood, where a fine is impoſed, but we do not intend to accept of a fine. Further he ſaid, that there is a Judgment in the point, and that is the Statute of 3 *Jac. cap.* 4. which injoyns an Oath for Recuſants to take, and for refuſal that they ſhall be committed until, &c. here he ſaid that an Act of Parliament hath done it in the like Caſe, and therefore he conceived the cuſtom reaſonable: and then he cited many preſidents of commitment in this very Caſe. 2 *H.* 5. *John Gidney* was dealt with in the ſame manner, 8 *E.* 4. *Charles Faman* was impriſoned, 36 *H.* 8. *Thomas White*, 1 *Jac.* Sir *Thomas Middleton*, all which were impriſoned for refuſing to take the Oath. And laſtly, he cited one 3 *Jac.* and that was Sir *William Bonds* Caſe, who was impriſoned by the Court of Alderman for the ſame cauſe, and it came judicially in queſtion; and he ſaid, that upon ſolemn debate it was reſolved, that he ſhould be remanded, wherefore he concluded that the commitment being by a Court of Record, and that for a contempt againſt the Court, and that for not obſerving of the cuſtoms of the City which is againſt the Oath of a freeman, and which are confirmed by Act of Parliament, that the commitment is good and lawful, and therefore prayed that the priſoner might be remanded. And now this Term it was reſolved by the Judges upon ſolemn debate, that the retorn notwithſtanding any of the ſaid exceptions was ſufficient. Juſtice *Mallet*: the Retorn is ſufficient in matter and form, but for the matter of it, I ſhall not ground my ſelf upon the cuſtom, but upon part of the record, wch is upon the contempt; for although I agree that *Conſuetudo loci* is of great regard, yet I conceive it is not ſtrong enough to take away the liberty of a freeman by

impriſonment. Power to impriſon the body of a freeman cannot be gained by preſcription or grant; and a grant is the ground of a preſcription, and therefore if it be not good in a grant, not in a preſcription: and I conceive that it is the Common Law only, or conſent to an Act of Parliament, that ſhall ſubject the body of a freeman to impriſonment; and it is reſolved in the 5 *Rep.* 64 *acc.* in *Clarkes* Caſe, and agreed in 8 *Rep.* 127. That a conſtitution cannot be made by a Corporation, who have power to make by-Laws upon pain of impriſonment; becauſe it is againſt the Statute of *Magna Charta*; wherefore I conceive the power to impriſon the body of a freeman cannot be gained by cuſtom: but although it cannot be gained by cuſtom, yet *Qui non tranſeunt per ſe, tranſeunt per aliud*, it will paſs as a thing incident to a Court of Record; and therefore although I hold that the cuſtom to impriſon is not good, yet I hold that the impriſonment here by a Court of Record for a contempt made unto it, as appeareth by the Retorn here it was, is good; for in the concluſion of the Retorn it ſaith, that he refuſed *in contemptum Curiæ, &c.* And that it is incident to a Court of Record to impriſon, 8 *Rep.* 38. *b.* it is there reſolved, that for any contempt done to a Court of Record the Judges may impoſe a fine; and 8 *Rep.* 59. *b.* It was reſolved, that to every fine, impriſonment is incident. Further, I conceive, that by the ſame reaſon that a Court of Record may impriſon for a fine, they may impriſon for a contempt, and in 8 *Rep.* 60. it is ſaid, that to impriſon doth belong only to Courts of Record: but which is in the point, it is reſolved, 119. *b.* in Doctor *Bonhams* Caſe, that it is incident to every Court of Record, to impriſon for a contempt done to the Court: and he ſaid, that if a Court of Record ſhould not have ſuch a coercive power, they ſhould be in effect no Court. Wherefore he conceived that the refuſing to take the Oath being a contempt, and that to a Court of Record, as it appeareth by the Retorn, that they may lawfully commit him for this contempt. For the objection that the *debito modo electus*, without ſhewing how, is too general: To that he anſwered, that

that it is only matter of inducement, and there is no neceſſity to ſhew all matter of inducement. For the objection that he had not notice of the election: To that he anſwered, that here is good notice, for by the Retorn it appeareth, that according to the cuſtom after he was elected, he was called to the Court, and the Oath tendred to him, and he refuſed, which without doubt implies notice, *& quod conſtat clare non debet verificare*; & as after appearance, all exceptions to proceſs are taken away, as the Books of 9 *E.* 4. 18. & 12 *H.* 4. 17, & 18. and many other Books are, ſo I ſay in this Caſe, after appearance, you ſhall never ſay that you had not notice, for by your appearance you admit it and the proceſs good. For the Objection to the Oath, that it is not good, becauſe it makes a man abjure his Trade, which is againſt Law and Reaſon: To that I anſwer, that the Aldermen are intruſted with the aſſize of Bread and Ale, and ſo with Wine and Fiſh, and therefore as it is unreaſonable, ſo it is againſt the Law, that during his Office he ſhould uſe the Trade of which he hath Juriſdiction and power to regulate, and to puniſh the miſdemeanors of it; and therefore it is enacted by the Statute of 12 *E.* 2. *cap.* 6. That no Officer of a City or Borough ſhall ſell Wine or Victuals during his Office. It is true, that this Statute is repealed by the Statute of 3 *H.* 8. *cap.* 8. but there is a Proviſo in the Statute that it extend not to *London*, ſo as the Statute of 12 *E.* 2. is in force ſtill as unto *London*. Then the Oath makes him to abjure no more than the Law forbids him to do, and which to do by him were unlawful, wherefore that exception is not good. For the exception that the impriſonment is general; to that I anſwer, that it is miſtaken, for it is only until he take the Oath, and therefore the retorn is good notwithſtanding that exception alſo: Now the end of impriſonment being obedience, and the party here not obeying but refuſing to take the Oath, for which he is committed; for my part, I conclude that he be remanded to priſon. Juſtice *Heath*: that the Retorn is good in matter and form; and I ground my ſelf upon the cuſtom, for I conceive that it is a good cuſtom, becauſe that the ground of it is good and reaſonable,

which is the Government of the City, for that totally depends upon the cuſtom; and I hold that the refuſing to take the Oath only is no ſufficient cauſe of impriſonment; but as it is an introduction to the ſupport of Government, by keeping of the cuſtoms and priviledges of the City, which every one by the Oath of a freeman is bound to keep: and this cuſtom is not againſt the Statute of *Magna Charta*, 9 *H.* 3. *cap.* 29. For that ſaith that no freeman ſhall be taken and impriſoned, *&c.* but *per legem terræ*: Now *Conſuetudo loci eſt lex terræ*, for in the Statute of 52 *H.* 3. *cap.* 3. There the Law and cuſtom of the Realm are joyned together as Synonyma, words of the ſame intent. For the Objection, That the cuſtom is not that they who ſhall be choſen Aldermen, ſhould be *idonei & habiles*, but it is only averred in the Retorn, that *Langham* here choſen to be Alderman is *idoneus & habilis*: to that I ſay, that we are to judge upon the Retorn as it is before us, and if upon the whole matter there appeareth ſufficient matter for us to adjudge the commitment lawful, be it true or falſe we ought to judge according to it; and if the Retorn be falſe, you have your remedy by way of Action upon the Caſe; and in this Caſe it is expreſly averred that the party choſen is *idoneus & habilis*, and it lies not in your power or in ours to gain-ſay it, wherefore I conceive that exception worth nothing. I agree that the Statute doth not confirm ill and unreaſonable cuſtoms, but here I ſay (as before) that this cuſtom hath a good and lawful foundation, and therefore it may be well confirmed; and the Oath although it be in general Terms, yet it ought to be taken, that he do keep and obſerve ſuch reaſonable and lawful Priviledges and no other. For the notice, I ſay, that it is manifeſt, that he had notice; which he conceived would be good evidence to a Jury, and that upon ſuch evidence they would find for the Plaintiff; and for the *debito modo electus*, he conceived it is good enough, becauſe that in the Retorn upon a *Habeas corpus* ſuch preciſe certainty is not required as in pleading: and for the impriſonment it is not in general, and ſo may happen to be perpetual, as was objected; but it is until he take the Oath, where-

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fore upon the whole matter I conceive the retorn is ſufficient, and that the priſoner ought to be remanded. *Bramſton* Chief Juſtice: the cuſtom is good, and none of the exceptions to the Retorn good, and therefore the priſoner ought to be remanded. The Queſtion upon the cuſtom is only whether this cuſtom, as it is here ſet forth by the retorn, to impriſon the body of a freeman be good or not; and as I have ſaid before, I hold it to be a good cuſtom, and that upon this difference, that a cuſtom generally to impriſon the body of a freeman is not a good cuſtom. But a cuſtom (as it is here) for a Court of Record to impriſon the body of a man who is choſen a great Officer for refuſing to take the office upon him without which the Government cannot ſubſiſt, is a good cuſtom: Beſides, here being a contempt refuſing to take the Oath, the Court may impriſon the body for it, without any cuſtom to help it, for it is incident to a Court of Record to impriſon. I agree the Caſe which was objected by Maſter *Sollicitor* of 21 *E.* 1. where the cuſtom of *Cambridge* is, that the Vice-chancellor may impriſon a Scholar taken in a ſuſpitious place, that is no good cuſtom, for it no way concerns the ſupportation of Government or the Commonwealth, and they may puniſh him another way, which may be good and as effectual as impriſonment: but not ſo in our Caſe, for if in this time in which there are many Aldermen wanting, all ſhould be fined, what will become of the Government? Further, I agree that the cuſtom to impriſon for forein buying and ſelling is no good cuſtom; upon the difference before taken: all great Officers have a proper Oath belonging to them, which is very needful for the greater ingagement of men in the due execution of their Offices, which ſo much concerns the Publike; and if they refuſe to take it, they are puniſhable for it; and this place in which Maſter *Langham* is choſen Alderman is the moſt great place of Government in the Realm, and of greateſt conſequence to the whole Kingdom, and therefore if it ſhould not be ſupplied with Aldermen, who is it who doth not ſee the great inconvenience which would follow? and therefore I hold that the cuſtom to impriſon until

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he take the Oath, and ſo by conſequence the Office upon him (for refuſing of the Oath is refuſing of the Office) is a good cuſtom; now for the Oath, it is the uſual Oath which hath been taken time out of mind, *&c.* And it is reaſonable and well penned. For the Objection that it is unreaſonable, becauſe it makes a man to abjure his Trade: To that I anſwer, that it is reaſonable, and makes him abjure no more than the Law forbids him to do, for it is not reaſonable that he who hath the Juriſdiction of aſſiſe of Bread and Ale, Wine and Fiſh, that he during his Office ſhould ſell thoſe things by retail. Now that the Mayor and Aldermen of *London* have this Juriſdiction, ſee the Statute of 31 *E. cap* 3. 10. for Fiſh; the Statute of 23 *H.* 8. *cap.* 4. for Ale and Beer; and 28 *H.* 8. *cap.* 14. for Wine, where in theſe Caſes power is given to all Head-Officers of Cities, Burroughs and Towns corporate to puniſh the Offenders againſt the rates and Aſſiſes of the things aforeſaid: and by the Statute of 12 E. 2. *cap.* 6. it is expreſly ordained, that no Officer of a City or Burrough ſhould ſell Wine or Victuals during his Office. I confeſs this Statute is repealed by the Statute of 3 *H.* 8, but yet there is a Proviſion in that Statute that it extend not to *London*: then the Law being that none of thoſe things ſhall be ſold by any Officer by retail during his Office; the Oath which makes a man to abjure that which the Law forbids, of neceſſity ought to be taken as lawful: beſides, there is a Writ grounded upon the Statute of 12 E. 2. which you ſhall find in the Regiſter 184. *a.* & *Fitz. N.B.* 173. *b.* that the party grieved might have directed to the Juſtices of aſſiſes, commanding them to ſend for the parties, and to do right, *&c.* Wherefore I hold the Oath good and lawful notwithſtanding this Objection. For the point of notice, I conceive it is not needful, and if it be, I ask who it is ought to give notice in this Caſe; and I ſay that no perſon is tied to do it, wherefore he ought to take notice of it at his peril. For the *debito modo electus*, I ſay that it is good, being in a Retorn upon a *Habeas corpus*, & it is ſaid, that it was *ſecundum conſuetudinem*, which includes all things needful for the objection. That it is averred in the retorn that he was *idoneus & habilis*, but

but that it is no part of the cuſtom that it ſhould be ſo, for it is only in general, *Si aliquis liber homo*, and doth not ſay *habilis & idoneus*, and therefore the cuſtom ſhould not be good: I anſwer, that it is averred in the Return, that it is ſo, that he is elected, and that is ſufficient for us to ground our Judgment: but further, I conceive that the *debito modo* helps it, wherefore upon the whole matter I conclude that the cuſtom is good, and the Return ſufficient, and therefore that the priſoner be remanded.

Paſch. 18° Car' *in the Common Pleas.*

Barrow *againſt* Wood *in Debt.*

238. IN Debt upon an Obligation brought by *Barrow* againſt *Wood*, the Defendant, demanded *Oyer* of the condition, & *ei legitur, &c.* and the effect of it was this, That the Defendant ſhould not keep a Mercers-ſhop in the Town of *Tewkesbury*, and if he did, that then within three moneths he ſhould pay forty pound to the Plaintiff: upon which the Defendant did demur in Law, and the point is only whether the condition be good or not. Serjeant *Evers*: the condition is good, becauſe it is no total reſtraint, for it is a reſtraint here only to *Tewkesbury*, and not to any other place, wherefore I conceive the condition good. I agree the Caſe in 11 *Rep.* 53. *b.* where a man binds himſelf not to uſe his Trade for two years, or if a husbandman be bound he ſhall not plough his Land, theſe are conditions againſt Law, becauſe where the reſtraint is total, although it be temporal, there the condition is not good; but the condition is not totally reſtrictive in our Caſe: and he compared this Caſe to the Caſe in 7 *H.* 6. 43. feoffee with warranty; Proviſo, that the feoffee ſhall not vouch it is a good condition, becauſe not totally reſtrictive; for although that the feoffee cannot vouch, yet he may rebut: ſo in this Caſe, although the Obligor cannot uſe his Trade in *Tewkesbury*, yet he may uſe it in any other place. And the Condition is not againſt Law; for if

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it were such a condition, then I agree it would be naught, but yet the Bond would stand good, for this is not a condition to do an act wch is *Malum in se*, for there the condition is naught & the Bond also, as 2 *E.* 4. 2. *b.* by *Cooke* & *Instit.* 206. *b.* But although a man cannot make a feoffment upon condition that the feoffee shall not alien, yet the feoffee may bind himself that he will not alien, and the Bond is good; and so I say in our Case, and if the condition in this Case should not be good, it would be very inconvenient; for it is a usual thing in a Town in the Country, for a man to buy the shop of another man & all his Wares in it, and if (the same being a small town, where one of that profession would serve for the whole Town) he who bought the shop and wares should not have the power to restrain him (the same being the ground & reason of the contract) from using of that trade in that place, it would be very inconvenient, wherefore he conceived that the condition was good, and prayed Judgment for the Plaintiff. Serjeant *Clarke* for the Defendant, that the condition is not good, for it is against the Law, and void, because it takes away the livelihood of a man, & that is one of the reasons against Monopolies, 11 *Rep.* 86, & 87. And that I conceive is grounded upon the Law of God, for in *Deut. chap.* 24. *ver.* 6. it is said, that *you shall not take in pledge the nether and upper milstone, for that is his life.* So that by the Law of God the restraining of any man from his Trade which is his livelihood is not lawful. And surely, our Law ought not to be against the Law of God; and that is the reason, as I conceive, wherefore by our Law the Utensils of a mans Profession cannot be distreined, because by that means the means of his livelihood should be taken away. And 2 *H.* 5. *fol.* 5. *b.* by *Hull*, the condition is against Law, and yet the case there is the very Case with our case, for there a man was bound, that he should not use his Art in *D.* for two years; whereupon *Hull* swore by God, that if the Obligee were present he should go to prison till he had paid a fine to the King, because the Bond is against Law, and therewith agrees the 11 *Rep.* 53. *b.* & 7 *E.* 3. 65. A Farmer covenants not to sow his land; the covenant is void: so as I conceive

ceive that although the condition be reſtrictive only to one place, or for a time, yet becauſe it takes away the livelihood of a man for the time, the condition is againſt Law, and void; and he cited a Caſe in the point againſt *Clegat* and *Batcheller*, *Mich.* 44 *Eliz.* in this Court, *Rot.* 3715. where the condition of a Bond was, That he ſhould not uſe his Trade in ſuch a place; and it was adjudged that the condition was againſt Law, and therefore the Bond void; and for theſe reaſons he prayed that Judgment might be entred, that the Plaintiff *nihil capiat per billam.* Juſtice *Reeve* did produce ſome Preſidents in the point; and he ſaid that the Law as it had been adjudged, ſtood upon this difference betwixt a contract, or *Aſſumpſit*, and an Obligation: A man may contract or promiſe that he will not uſe his Trade, but he cannot bind himſelf in a Bond not to do it; for if he do ſo it is void. And for that he cited *Clegat* and *Batchellers* Caſe before, that the obligation in ſuch Caſe is void; and he ſaid, that the reaſon which was given by one, why the Bond ſhould be void, was grounded upon the Statute of *Magna Charta*, *cap.* 29. which will, That no freeman ſhould be ouſted of his Liberties but *per legem terræ*; and he ſaid, that the word Liberties did extend to Trades; and *Reeve* ſaid, that by the ſame reaſon you may reſtrain a man from uſing his Trade for a time, you may reſtrain him for ever. And he ſaid, that he was confident that you ſhall never find one Report againſt the Opinion of *Hull*, 2 *H.* 5. For the other part of the difference, he cited *Hill.* 17 *Jac.* in this Court, *Rot.* 1265. and 19 *Jac.* in the Kings Bench *Bragg's* caſe; in which Caſes he ſaid, it was adjudged againſt the Action upon a Bond, but with the Action of the Caſe upon a promiſe that it would lie. But note, that all the Judges, *viz. Foſter*, *Reeve* and *Crawley* (*Banks* being abſent) held clearly, that if the condition be againſt the Law, that all is void, and not the condition only as was objected by *Evers*, and it was adjorned.

Apſly *againſt* Boys *in the Common Pleas in a* Scire facias, *to execute a Fine upon a Grant and Render*, *Intrat Trin.* 16 Car. *Rot.* 112.

239. THe Caſe upon the Pleading was this: A fine upon a Grant and Render was levied in the time of *E.* 4. upon which afterwards a *Scire facias* was brought, and Judgment given, and a Writ of ſeiſin awarded but not executed. Afterwards a fine *Sur conuſans de droit come ceo*, &c. with Proclamations was levied, and five years paſſed, and now another *Scire facias* is brought to execute the firſt fine, to which the fine *Sur conuſance de droit come ceo* is pleaded; ſo as the only Queſtion is, Whether the fine with Proclamations ſhall bar the *Scire facias* or not. Serjeant *Gotbold* for the Plaintiff, it ſhall not bar; and his firſt reaſon was, becauſe not executed, 1 *Rep.* 96, 97. and 8 *Rep.* 100. If a diſſeiſor at the Common Law before the Statute of Non-claim, had levied a fine, or ſuffered Judgment in a Writ of Right until Execution ſued, they were no bars, and a fine at Common Law was of the ſame force as it is now, and if in thoſe Caſes no bar at Common Law until Execution, that proves that this intereſt by the fine upon grant and render is not ſuch an intereſt as can bar another fine, before execution. Beſides, this Judgment by the *Scire facias* is a Judgment by Statute, and Judgment cannot be voided but by error or attaint. Further, a *Scire facias* is not an Action within the Statute of 4 *H.* 7. and therefore cannot be a bar, 41 *E.* 3. 13. & 43 *E.* 3. 13. Execution upon *Scire feci* returned without another plea; and it is not like to a Judgment; for there the party may enter, but not here. Beſides, it ſhall be no bar, becauſe it is executory only, and *in cuſtodia legis*, and that which is committed to the cuſtody of the Law, the Law

Law doth preſerve it, as it is ſaid in the 1 *Rep.* 134. *b.* and he compared it to the Caſes there put, and a fine cannot fix upon a thing executory, and the eſtate ought to be turned to a right to be bound by a fine, as it is reſolved in the 10 *Rep.* 96. *a.* & 9 *Rep.* 106. *a. Com.* 373. And the eſtate of him by the firſt fine upon grant and render is not turned to a right by the ſecond fine. Laſtly, the Statute of 4 *H.* 7. is a general Law, and in the affirmative, and therefore ſhall not take away the Statute of *Weſt.* 2. which gives the *Scire facias*, and in proof of that he cited 39 *H.* 6. 3. 11 *Rep.* 63. & 68. and 33 *H.* 8. *Dyer* 15. I agree the Caſe which hath been adjudged, that a fine will bar a Writ of Error, but that is to reverſe a Judgment which is executed, but here the Judgment is not executed, and therefore cannot be barred by the fine: wherefore he prayed Judgment for the Plaintiff. Note, that it was ſaid by the Judges, that here is no avoiding of the fine, but it ſhall ſtand in force, but yet notwithſtanding it may be barred; and they all ſaid, that he who hath Judgment upon the *Scire facias* upon the firſt fine might have entred; and they ſtrongly inclined, that the *Scire facias* is barred by the fine, and doth not differ from the Caſe of a Writ of Error; but they delivered no opinion.

Taylers *Caſe*.

240. THe Caſe was thus. The Iſſue in Tail brought a *Formedon in Deſcend.* and the Defendant pleaded in Bar, and confeſſed the Eſtate Tail; but ſaid, that before the death of the Tenant in Tail *J. S.* was ſeiſed in fee of the lands in queſtion, and levied a fine to him, and five years paſſed, and then Tenant in Tail died; & whether this plea be a bar to the Plaintiff or not was the Queſtion; and it reſted upon this, Whether *J. S.* upon this general Plea ſhall be intended to be in by diſſeiſin or by feoffment; for if in by diſſeiſin, then he is barred, if by feoffment, not: and the opinion of the whole Court was clear without any debate, that he ſhall be intended in by diſſeiſin, and ſo the Plaintiff is Bar, as the Books

are, 3 *Rep.* 87. *a. Plow. Com. Stowels* Caſe, and *Bankes* Chief Juſtice ſaid, that it ſhall not be intended that Tenant in Tail had made a feoffment to bar his iſſues unleſs it be ſhewed, and it lies on the other part to ſhew it; and a feoffment is as well an unlawful Act as a diſſeiſin, for it is a diſcontinuance.

Commins *againſt* Maſſam *in a* Certiorare *to remove the proceedings of the Commiſſioners of Sewers.*

241. THe Caſe upon the proceedings was thus: Leſſee for years of Lands within a level, ſubject to be drowned by the Sea, covenanted to pay all aſſeſsments, charges and taxes, towards or concerning the reparation of the premiſſes: A wall which was in defence of this level and built ſtraight, by a ſudden and inevitable Tempeſt was thrown down; one within the level ſubject to be drowned, did diſburſe all the mony for the building of a new wall; and by the order of the Commiſſioners a new wall was built in the form of a Horthooe; afterwards the Commiſſioners taxed every man within the level towards the repaying of the ſum diſburſed, one of which was the leſſee for years, whom they alſo truſted for the collecting of all the mony; and charge him totally for his land, not levying any thing upon him in the reverſion, and alſo with all the damages, *viz.* uſe for the mony. Leſſee for years died, the leaſe being within a ſhort time of expiration, his executor enters, and they charge him with the whole; and immediately after the years expired, & the executors brought this *Certiorare*, upon which there was many queſtions. Juſtice *Mallet*: I conceive that the proceedings of the Commiſſioners are not lawfully removed into this Court, becauſe as I conceive no *Certiorare* lies to remove their proceedings at this day, becauſe that their proceedings are in Engliſh upon which I cannot judge, for all our proceedings ought to be in Latine.

Beſides,

Beſides, I cannot judge upon any Caſe if it be not before us by ſpecial verdict, demurrer, or writ of Error, and it is not here in this Caſe by any of thoſe ways; and if it be here by *Certiorare*, yet we are not enabled to judge as this Caſe is; for the concluſion of the writ is, *Quod faciamus quod de jure & ſecundum legem, &c. fuerit faciend.* And as I have ſaid before, we cannot judge upon Engliſh proceedings, and they have power to proceed in Engliſh by the Statute of 23 *H.* 8. *cap.* 5. by which Statute they have a kind of Legiſlative power given, for it doth not reſerve any power to us, to redreſs their proceedings; and as I conceive no writ of error lieth at this day to correct their proceedings, becauſe that they are in Engliſh; and if they have Juriſdiction and proceed according to it, we have no power to correct them; becauſe that the Statute leaves them at large to proceed according to their diſcretions. But where they have no Juriſdiction, there we may correct them. True it is, that before the Statute of 23 *H.* 8. there are many Preſidents of *Certioraries* to remove the proceedings of the Commiſſioners of Sewers into this Court, for then their proceedings were in Latin, but I do not find any ſince the Statute: wherefore I conclude that no *Certiorare* will lie in this Caſe, and then the proceedings not being lawfully removed I cannot judge upon them, wherefore I ſpeak nothing to the matter in Law contained in the proceedings of the Commiſſioners. *Heath:* I conceive notwithſtanding any thing alledged by my brother *Mallet* that this Court is well poſſeſſed of the Cauſe, and may well determine it: the Queſtion here was not, whether the Cauſe be well removed, but whether the Commiſſioners have well proceeded as this Caſe is, or not; I hold that the cauſe is well removed by the *Certiorare*, there is no Court whatſoever but is to be corrected by this Court: I agree that after the Statute no Writ of Error lieth upon their proceedings, but that proves not that a *Certiorare* lies not, they are enabled by the Statute to proceed according to their diſcretions, & therefore if they proceed *ſecundum æquum & bonum*, we cannot correct them; but if they proceed where they have no Juriſdiction, or without Commiſſion, or contrary;

ry to their Commiſſion, or not by Jury, then they are to be corrected here: if a Court of Equity proceed where they ought not, we grant a Prohibition. Without queſtion in treſpaſs or Replevin their proceedings are examinable here; and I ſee no reaſon but upon the ſame ground in a *Certiorare* they cannot make a decree of things meerly collateral, or concerning other perſons; here they have certified their Commiſſion, and that the aſſeſſment was by a Jury of twelve men, but if they had certified that it was *per ſacrament. Juratorum* generally without ſaying twelve men, it had not been good, as it was by us lately adjudged, becauſe that for any thing appears to the contrary it might be by two or three only, where it ought to be by twelve; and I conceived they have well done here in laying all upon the leſſee for years: by the Law of Sewers, all which may be endamaged, or have benefit, are chargeable, and it is in their diſcretion ſo to do. But in this caſe they may charge the leſſee or leſſor (if not for the ſpecial covenant of the leſſee) at their diſcretions; for the Statute ſaith *owners* or *occupiers*; & I conceive that the covenant here doth bind the leſſee, for it is preſumed that he hath conſiderable benefit for it, and the Commiſſioners may take notice of it. But if the covenant doth not bind the leſſee, yet I for my part will not reverſe their decree for that, becauſe that where they have Juriſdiction they may proceed according to their diſcretions, and he covenanted to pay all taxes concerning the premiſſes, and here it concerns the premiſſes although the wall be in a new form: and it was objected, that it is now fallen upon an executor, which is hard; which is not ſo becauſe the teſtator was chargeable, and here the executor occupies although it be but for a ſhort time, and he was an occupier at the time of the decree; and therefore it is reaſon that he ſhould be charged. But it was further objected that he hath not aſſets; I anſwer, that was not alledged before the Commiſſioners; and if an Action be brought againſt executors at the Common Law, and they plead, and take not advantage of not having aſſets, it is their own fault, and therefore ſhall be charged: ſo here. But it was further objected, that the Commiſſioners

ſioners have not Juriſdiction of damages, *viz.* with the intereſt of the mony. But I hold clearly otherwiſe, that they having Juriſdiction of the principal, ſhall have Juriſdiction of the damages; wherefore I conclude that the Commiſſioners have well done, and that their decree is good. *Bramſton* Chief Juſtice: in this Caſe there are five points. Firſt, whether the covenant ſhall extend to this new wall or not. Secondly, whether this collateral covenant be within their Juriſdiction or not. Thirdly, whether their power do extend to an executor or not. Fourthly, whether they have Juriſdiction of damages or not. And laſtly, whether their proceedings be lawfully removed by this *Certiorare* or not: for the latter I hold that their proceedings are lawfully removed, and that the *Certiorare* lieth at this day to remove their proceedings; but I confeſs, if I had thought of it, I would not have granted it ſo eaſily, but it was not made any ſcruple at the Bar, nor any thing ſaid to it, and hereafter I ſhall be very tender in granting of them. True it is, before the Statute of 23 *H.* 8. they were common, but there are few to be found after the Statute, and we ought to judge here as they ought to judge there, and we cannot determine any thing upon Engliſh proceedings, and at firſt I put that doubt to the Clerks of the Court, Whether if we confirm their decree, we ought to remand it, or whether we ought to execute it by Eſtreat into the Exchequer or not, and they could not reſolve me; wherefore I much doubted whether we might proceed to queſtion their decree upon this *Certiorare* or not. But becauſe I was informed that the parties by agreement have made this caſe as it is here before us upon the *Certiorare*, and have bound themſelves voluntarily in a recogniſance to ſtand to the Judgment of the Court upon the proceedings as they were removed upon the *Certiorare* by the agreement of the parties, therefore I did not ſtick upon the *Certiorare*, becauſe what was done was by conſent, *& conſenſus tollit errorem*, if any be. Now for the points as they ariſe upon the proceedings of the Commiſſioners; and for the firſt, I hold that the covenant doth well extend to this new wall; and the making of it in the form of a horſhooe is not material

rial, ſo as it be adjoyning to the land as it here was, for that may be ordered according to their diſcretions: it is a rule in Law, that the covenant of every man ought to be conſtrued very ſtrong againſt himſelf; and although that in this Caſe the new wall be not parcel of the premiſſes, as it was at the time of the covenant; becauſe that the wall then in eſſe and to which the covenant did extend was a ſtraight wall, yet according to the words of the covenant, this tax is towards the reparation of the premiſſes, and if it ſhould not extend to this new wall, the covenant ſhould be idle and vain; and clearly, the meaning of the parties was, that it ſhould extend to all new walls. For the ſecond point, I hold the covenant, although it be a collateral thing, within their Juriſdiction: true it is, as it is ſaid in 28 *H.*8. that contracts are as private Laws betwixt party and party: but you ought to know that their Commiſſion gives them power to charge every man according to his tenure, portion, and profit; and he who is bound by cuſtom or preſcription to repair ſuch walls is not within the words of their Commiſſion; yet it is reſolved in the 10 *Rep.* 139, 140. in *Kigbleys* caſe that the Commiſſioners may take notice of it, and charge him only for the reparations, where there is default in him and the danger not inevitable; and by the ſame reaſon you may exclude this covenant to be out of their Juriſdiction, you may exclude preſcription alſo. I agree that where the covenant is meerly collateral, as if a man who is a ſtranger covenants to pay charges for repairing of ſuch a wall, that that is not within their Juriſdiction, becauſe he is a meer ſtranger, and cannot be within their Commiſſion; but in our Caſe it is otherwiſe, for the covenantor is occupier of the land, and it hath been adjudged, that if lands or chattels are given for the reparation of a Sea-wall, that it is within their Juriſdiction, and they may meddle with it, & that is as collateral as the covenant in queſtion, wherefore I hold that the covenant is within their Juriſdiction. For the third point, I hold that they may well charge the executor, for the executor here hath the leaſe as executor: but it was objected, That the term is now determined, and peradventure the executor hath not

not aſſets; To that I anſwer, that it is admitted that he hath aſſets, for the Commiſſioners cannot know whether he hath aſſets or not, and therefore he ought to have alledged the ſame before the Commiſſioners, and becauſe he hath not done it he hath loſt that advantage, and it ſhall be intended that he hath aſſets by not gain-ſaying of it. Fourthly, for the damages, I firſt chiefly doubted of that, but now I hold that it is within their Juriſdiction: Put caſe that one in extreme neceſſity, as in this Caſe, diſburſe all the money for the reparations of the wall, or Sea-bank, if the Caſe had gone no further clearly, he ſhall be repaid by the tax and levy after; and I conceive by the ſame reaſon they have power to allow him damages and uſe for his mony; for if it ſhould not be ſo, it would be very inconvenient, for who would after diſburſe all the money to help that imminent danger and neceſſity if he ſhould not be allowed uſe for his money? and the Leſſee here is only charged with the damages for the money collected which he had in his hands, and converted to his own uſe, and therefore it is reaſonable that he ſhould be charged with all the damages. Beſides, they having conuſans of the principal, have conuſans of the acceſſory as in this Caſe of the damages, and he urged *Fitz.* 113. *a.* to prove that before the Statute of 23 *H.* 8. they had a Court, and were called Juſtices: but he held as it was agreed before, That no Writ of Error lieth after this Statute, but yet he ſaid that the party grieved ſhould be at no loſs thereby; for he ſaid, that where the party cannot have a Writ of Error, not *Audita querela*, there he ſhall be admitted to plead, as in 11 *H.* 7. 10. *a.* Where a Recogniſance of debt paſſed for the King upon iſſue tried, and afterwards the King pardons it, the party after Judgment may plead it, becauſe *Audita querela* doth not lie againſt the King, and where a man is not party to a Judgment, there he cannot have a Writ of Error, but there he may falſifie, ſo I conceive that he may in this Caſe, becauſe he cannot have a Writ of Error; and I conceive as it hath been ſaid before, that after the Statute of 23 *H.* 8. the Commiſſioners of Sewers have a mixt Juriſdiction of Law and equity.

For the *Certiorare* I will adviſe hereafter how I grant it, although I conceive (as I have ſaid before) that a *Certiorare* lies after the Statute, and is not taken away by the Statute, and I conceive in ſome clearneſs that it may be granted where any fine is impoſed upon any man by Commiſſioner, which they have authority to do by their Commiſſion, as appeareth by the Statute to moderate it in Caſe that it be exceſſive. But as I have ſaid before, becauſe that the parties by agreement voluntarily bound themſelves by Recogniſance to ſtand to the judgment of this Court upon the proceedings as they are certified, that made me at this time not to ſtand upon the *Certiorare*, wherefore I do confirm the decree.

242. *Rolls* moved this Caſe: *A.* did ſuffer *B.* to leave a trunk in his houſe, Whether *B.* might take it away without the ſpecial leave of *A.* was the Queſtion. Juſtice *Malet*, leave is intended; but *Rolls* conceived that he could not take it without leave.

Hammon *againſt* Roll, *Paſch.* 18. Car. *in the Common Pleas.*

243. IN an Action upon the Caſe upon *Aſſumpſit*, the Caſe upon ſpecial verdict was this: *A.* and *B.* were bound joyntly and ſeverally in a Bond to *C.* who releaſed to *A.* afterwards there being a communication betwixt *B.* and *C.* concerning the ſaid debt, *B.* in conſideration that *C.* would forbear him the payment of the ſaid mony due and payable upon the ſaid Bond till ſuch a day promiſed to pay it, &c. *C.* for default of payment at the ſaid day, brought this Action upon the Caſe. *B.* pleaded the general iſſue, and thereupon the whole matter before was found by the Jury. Serjeant *Clarke*: here is not any good conſideration whereupon to ground an

Aſſumpſit

Aſſumpſit, becauſe by the releaſe to one obligor the other is diſcharged; and then there being no debt, there can be no conſideration, and therefore the promiſe void, becauſe it is but *nudum pactum*. *Rolls* contrary, that there is a good conſideration, becauſe that although by the releaſe to one obligor, the debt of the other be diſcharged *ſub modo*, *viz.* if the other can get it in his power to plead, yet it is no abſolute diſcharge; for if he cannot get it into his hand to plead it, he ſhall never take advantage of it; and then if it be no abſolute diſcharge, but only *ſub modo*, *viz.* if he can procure it into his hand to plead, then the conſideration is good, for perhaps he ſhall never get it. Juſtice *Foſter* asked him if by this releaſe the debt be not intirely diſcharged: to which he anſwered, *No*, as to *B.* only, but *ſub modo* as I have ſaid before; but he ſaid, and with him agreed the whole Court, that the Law is clearly otherwiſe that the debt is intirely gone and diſcharged; and then clearly there can be no conſideration in this Caſe. Juſtice *Reeve:* every promiſe ought to have a conſideration, and that ought to be either benefit to him that makes it, or diſadvantage to him to whom it is made, and in this Caſe the conſideration which is the ground of the *Aſſumpſit* is neither benefit to him that made it, nor diſadvantage to him to whom it was made, becauſe there was no debt; for it was totally diſcharged by the releaſe made to *A. Crawley* agreed to it; *Banks* Chief Juſtice was abſent. But becauſe the obligation was laid to be made in *London*, and no Ward or Pariſh certain put from whence the Viſne ſhould come, they conceived clearly that it was not good.

Paſch. 18° Car. *in the Kings Bench.*

Heamans *Habeas Corpus.*

144. *Richard Heaman* was impriſoned by the Court of Admiralty, upon which he prayed a *Habeas corpus*, and it was granted, upon which was this retorn, *viz.* Firſt the cuſtom of the Admiralty is ſet forth, which is to attach goods *in cauſa civili & maritimi*, in the hands of a third perſon; and that upon four defaults made, the goods ſo attached ſhould be delivered to the Plaintiff upon caution put to reſtore them if the debt or other cauſe of Action be diſproved within the year, and after four defaults made if the party in whoſe hands the goods were attached, refuſed to deliver them, that the cuſtom is to impriſon him until, *&c.* Then is ſet forth how that one *Kent* was indebted unto *J. S.* in ſuch a ſum upon agreement made *Super altum mare*, and that *Kent* died, and that afterwards *J. S.* attached certain goods of *Kents* in the hands of the ſaid *Heaman* for the ſaid debt, and that after upon ſummons four defaults were made, and that *J. S.* did tender caution for the re-delivery of the goods ſo attached and condemned, if the debt were diſproved within the year; and that notwithſtanding the ſaid *Heaman* would not deliver the goods, for which he was impriſoned by the Court of Admiralty until, *&c.* *Widdrington* of Counſel with the priſoner, took this exception to the Retorn, that it appeareth by the Retorn that *Kent* who was the debtor was dead before the attachment, and you ſhall never attach the goods of any man as his goods after his death, becauſe they are not his goods, but the goods of the executor in the right of the teſtator. Beſides, although the attachment be upon the goods, yet the Action ought to be againſt the perſon, which cannot be he being dead, wherefore he prayed that the priſoner might be

be diſcharged. *Hales*; that the attachment is well made, notwithſtanding that the party was dead at the time of attachment, for it is the cuſtom of their Court ſo to proceed, although that the party be dead. Beſides, he ſaid that although that the party were dead, yet the goods are *bona defuncti*, and to prove that he cited 10 E 4. 1. the opinion of *Danby* and *Catesby*. That the grant of *Omnia bona & catalla ſua* by an executor will not paſs the goods which he hath as executor, becauſe they are the goods of the dead. But note, that it was here ſaid by *Bramſton* Chief Juſtice, that it had been adjudged divers times againſt the opinion aforeſaid, that it paſſeth the goods which the executor hath as executor: and he ſaid, that if a man hath a judgment againſt an executor to recover goods, the Judgment ſhall be that he recover *bona defuncti*. To that the Court ſaid, that the Judgment is not *quod recuperet bona defuncti*, but *quod recuperet* the goods which *fuerunt bona defuncti*. For the objection, that the plaint ought to be againſt the perſon, which cannot be when he is dead, to that *Hales* ſaid, that in the Admiralty the Action is againſt the goods, and therefore the death of the perſon is not material; to that Juſtice *Heath* ſaid, that it is the party who is charged, the goods are only chargeable in reſpect of the perſon, and you ſhall never charge the goods alone, but there ought to be a party to anſwer. *Hales*: if they have Juriſdiction, they may proceed according to their Law, and we cannot hinder it: to which *Heath* ſaid, take heed of that, when it concerneth the liberty of the Subject, as in this Caſe. And note, that *Bramſton* Chief Juſtice aſked the Proctor of the Admiralty then preſent this Queſtion, Whether by their Law the death of the party did not abate the action; and he ſaid that it did; then ſaid the Chief Juſtice, it is clear that an attachment cannot be againſt the goods the party being dead; wherefore by the whole Court the cuſtom to attach goods after the death of the party is no good cuſtom; and therefore they gave Judgment that the priſoner ſhould be diſcharged.

245. Note,

245. Note, that *Bramſton* Chief Juſtice and *Heath* Juſtice ſaid in evidence to a Jury, that a Will without a Seal is good to paſs the Land, and that it is a Forgery expreſly by the Statute of 5 *Eliz. cap.* 14. to forge a Will in writing.

Paſch. 18° Car' *in the Kings Bench.*

Fulham *againſt* Fulham *in a Replevin.*

246. THe Caſe was thus: *Henry* the 8 ſeiſed of a Manor in which are Copyholds, grants a Copyhold for life generally, and whether this be a deſtroying of the Copyhold or not, was the Queſtion. And it was argued by *Harris* that the grant was utterly void, becauſe the King was deceived in his grant, for he ſaid, the King had election to grant it by Copy, and therefore it ſhall not be deſtroyed by a general grant without notice, and cited many Caſes to prove that where the King is deceived in the Law, his Grant ſhall be void; but *Bramſton* Chief Juſtice and the Court ſaid, that it never recited in any of the Grants of the King what is Copyhold, and they were clear of Opinion that the Grant was not void. But whether it deſtroy the Copyhold or not, ſo as the King hath not election to grant the ſame after by Copy, that they agreed might be a Queſtion. Serjeant *Rolls* at another day argued that the Copyhold was deſtroyed by the Kings grant, but he agreed that it is not reaſon that the Patent ſhould be utterly void, for that he ſaid would overturn all the Kings grants, for there is not any Patent that ever recited Copyhold, and therefore the Queſtion is, whether the Copyhold be deſtroyed or not; and he argued that it is, becauſe there needeth not any recital of Copyhold, *Br. Pat.* 93. It is agreed that where the King grants Land which is in leaſe for term of years of one who was attainted

tainted, or of an Abby or the like, that the grant is good without recital of the leaſe of him who was attainted, &c. For he ſhall not recite any leaſe but leaſes of Record, and therewith agreeth 1 *Rep.* 45. *a.* and *Dyer, fol.* 233. *pl.* 10, & 11. Now he ſaid there is no Record of theſe Copyholds, and therefore there needs not any recital of them, and therefore the King is not deceived. Further he ſaid, that no man is bounden to inform the King in this Caſe, and therefore the King ought to take notice, and then the reaſon of the Caſe of a common perſon comes to the Kings Caſe, becauſe the Copyhold was not demiſeable for time as before, according to the nature of a Copyhold, and therefore of neceſſity is deſtroyed, and the Court as I ſaid before, did conceive the Caſe queſtionable.

Burwell *againſt* Harwell *in a* Replevin.

247. THe Caſe was ſhortly thus: A man acknowledged a Statute, and afterwards granted a Rent-charge: the land is extended, the Statute is afterwards ſatisfied by effluxion of time, and the grantee of the rent did diſtrain; and whether he might without bringing a *Scire facias*, was the Queſtion. And the Caſe was ſeveral times debated at the Bar, and now upon ſolemn debate by the Judges at the Bench, reſolved. But firſt, there was an exception taken to the pleading, which was, that the avowant ſaith, that the Plaintiff took the profits from ſuch a time to ſuch a time, by which he was ſatisfied, that was ſaid to be a plea only by argument, and not an expreſs averment, and therefore was no good matter of iſſue, and of this opinion was Juſtice *Heath* in his argument: but *Brampton* Chief Juſtice, that it is a good poſitive plea, and the Plaintiff might have traverſed without that, that he was ſatisfied *modo & forma*, and in *Plowd. Comment.* in *Buckley* and *Rice Thomas* Caſe, there, *ut, cum, tam, quam*, are good iſſues. Now for the point in Law, Juſtice *Mallet* was for the Avowant, that the diſtreſs was lawful, the grantee

tee of the Rent cannot have a *Scire facias*, because he is a stranger, and a stranger cannot have a *Scire facias*, either to account, or have the land back again. The Cases which were objected by my Brother *Rolls*, *viz.* 32 *E.* 3. *tit. Scire facias* 101. *Br. Scire facias* 84. & *Fitz. Scire facias* 134. That the feoffee shall have a *Scire facias*, do not come to our Case, for here the grantee of the Rent is a stranger not only to the Record but to the Land, which the feoffee is not. Further, it was objected, that the Grantee of the Rent claims under the conusor, and therefore shall not be in a better condition than the Conusor; there are divers Cases where grantee of a rent shall be in better condition than the Conusor; the Lord *Mountjoyes* Case: a man makes a lease for years rendring rent, and afterwards acknowledgeth a Statute, and afterwards grants over the rent, now it is not extendable. Besides, it was objected, that if this should be suffered it would weaken the assurance of the Statute and disturb it: I agree that may be, but if there be not any fraud nor collusion, it is not material, and then he being a stranger, if he cannot have a *Scire fa.* he may distrain: it is a Rule in Law, *Quod remedio destituitur ipsa re valet, si culpa abfit.* 21 *H.* 7. 33. Where there is no Action to avoid a Record, there it may be avoided by averment, *&c.* 18 *E.* 4. 9. & 5 *Rep.* 110. 32 *Eliz. Syers* Case; a man indicted of felony done the first day of *May*, where it was not done that day, he cannot have an averment against it, but his feoffee may. 12 *H.* 7. 18. The King grants my land unto another by Patent, I have no remedy by *Scire facias*. 19 *E.* 3. *Br. Fauxifer* of recovery. 57. *F. N. B.* 211. 20 *E.* 3. 6. 9 *E.* 4. 38. *a.* A man grants a rent, and afterwards suffers a recovery, the grantee shall not falsifie the recovery because he is a stranger to the recovery, but he may distrain, which is the same Case in effect with our Case: for which cause I conceive that the distress is good, and that the Replevin doth not lie. Justice *Heath*: the distress is unlawful, for he ought to have a *Scire facias*, clearly the conusor ought to bring a *Scire facias*, See the Statute of 13 *E.* 1. *Fulwoods* Case, 4 *Rep.* 2 *R.* 3. & 15 *H.* 7. and the reason why a *Scire facias* is granted, is, because that

that when a possession is settled, it ought to be legally evicted. Besides, it doth not appear in this Case when the time expired: besides, costs are to be allowed in a Statute as *Fulwoods* Case is, and the same ought to be judged by the Court and not by a Jury, which is a reason which sticks with me, see the Statute of 11 *H.* 6. it is objected that the Grantee of the rent cannot have a *Scire facias*, it will be agreed that the conusor himself cannot enter without a *Scire facias*, and I conceive *à fortiori* not the Grantee of the Rent. I do not say here there is fraud, but great inconvenience and mischief if arrerages incurred for a great time (as in this Case it was) shall be all levied upon the conusee, for any small disagreement, as for a shilling, without any notice given to him by *Scire facias*, and he should be so ousted and could not hold over. I hold that of necessity there ought to be a *Scire facias*, and he ought to provide with the Grantor to have a *Scire facias* in some fit time, but I hold that the Grantee here may well have a *Scire facias*. I agree the Cases where it is to avoid a Record, there ought to be privity, as the Books are, but here he doth not avoid the Record, but allows it, for the *Scire facias* ought to be only to account, 38 E. 3. The second conusee of a Statute shall have a *Scire facias* against the first conusee, and I conceive that by the same reason the Grantee of the rent here shall have it, and in that Case there is no privity betwixt the first conusee and the second conusee; for which cause he did conclude that the distress was unlawful, and that the Replevin would well lie. *Bramston* Chief Justice for the Avowant, that he may well distrein, and cannot have a *Scire facias*, but if he may have a *Scire facias*, yet he may distrein without it. There is no authority in the Law directly in the point in this Case: I agree that if there be any prejudice to the conusee, there it is reason to have a *Scire facias*. It was objected, that it is a constant course to have a *Scire facias* in this Case. But I believe you will never find a *Scire facias* brought by the Grantee of a rent, or other profit apprender. Besides, the best way to judge this Case is to examine what the *Scire facias* is which ought to be brought, and

what the Judgment is which is given upon it, whether he may recover the thing in demand or not, *vid.* 32 E. 3. *Fitz. Scire facias* 101. & 47 E. 3. 11. which are brought to have account, and to ſhew cauſe wherefore he ſhould not have the land: ſee *Fitz. Scire facias* 43. *v.* The old Entries, the Judgment which is given thereupon, and the demand there is *quod tenement. præd. redeliberatur*, and may the grantee in this Caſe have the land and thing in demand? certainly not; and that gives ſufficient anſwer to the Caſes objected by my Brother *Heath*, where the ſecond conuſee ſhall have a *Scire facias* againſt the firſt. Beſides, you ſhall never find in all our Books that a man ſhall have an attaint or a writ of error, but he who may be reſtored to the thing loſt by the judgment or verdict, 2 R. 3. 21 *Dyer.* 89. 9 *Rep.* the Lord *Sanchars* Caſe; ſo in debt and erroneous Judgment upon it, wherewith agreeth Doctor *Druries* Caſe, 8 *Rep.* 12. & 18 E. 3. 24. the feoffee ſhall have a Writ of Error, becauſe he ſhall have the land, and ſee 32 E. 3. *Scire facias* 101. And the grantee ſhall not have a Writ of Error in this Caſe upon erroneous Judgment, and for the ſame reaſon he ſhall not have a *Scire facias*, and the grantee cannot have a *Scire facias* for want of privity, and therefore I conclude that he cannot have a *Scire facias*, for if he might, certainly it would have been brought before this time, either for this cauſe, or for ſome other profit apprender. It was objected that he ſhall not be in better condition than the conuſor, that is regularly true as to the right, but he may have another remedy. It was objected that the reaſon why that a Statute without a *Scire facias* ſhall not be defeated is, becauſe he is in by Record, and therefore ſhall not be defeated without Record, but that is not the true reaſon, but the reaſon is, becauſe the conuſee ought to have coſts and damages, beſides his debt, as is *Fullwoods* Caſe 4 *Rep.* and 15 *H.* 7. 16. is, that the Chancellor ſhall judge of the coſts and damages. But 47 E. 3. 10. & 46 E 3. *Scire facias* 132. by all the Judges that they lie in averment. But here an inconvenience was objected, that great arrerages ſhould be put upon the conuſee for a little miſtaking, to that he ſaid, that of a ſmall miſtake the

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Court ſhall judge, and it ſhall not hurt him, but if he hold over being doubly ſatisfied, it is reaſon that he pay the arrerages; and he put this Caſe, A man acknowledgeth a Statute, and afterwards makes a leaſe to begin at a day to come, the leſſee ſhall have a *Scire facias*; for where remedy doth fail, the Law will help him; for which cauſe he concluded, and gave Judgment for the avowant.

Trin. 18 Car' *in the Kings Bench.*

Paulin *againſt* Forde.

248. AN Action upon the Caſe brought for words; the words were theſe: *Thou art a thieviſh Rogue, and haſt ſtolen my wood*, innuendo lignum, &c. *Gardiner*: the words are not actionable, becauſe it ſhall be intended wood ſtanding or growing, and not wood cut down, and ſo he ſaid it had been adjudged; ſo if a man ſays of another, that he hath ſtollen his Corn or Apples, the words are not actionable, becauſe they ſhall be intended growing. *Bramſton* Chief Juſtice, that the words are actionable, becauſe that wood cannot otherwiſe be meant, but of wood cut down, becauſe it is *Arbor dum creſcit, lignum dum creſcere neſcit*, for which cauſe he conceived that the words were actionable; and it was adjorned.

Chambers *and his wife againſt* Ryley.

249. ACtion upon the Caſe for words, the words were theſe: Chambers *his wife is a Bawd, and keeps a Bawdy-houſe:* for which words the Action was brought, and the concluſion of the Plea is *ad damnum ipſorum. Wright:* the words are not actionable, becauſe it is not the wife that keeps the houſe but the husband, and therefore the ſpeaking the words of the wife cannot be any damage to him; but admit the words were actionable, the husband only ought to bring the Action, becauſe the ſpeaking of the words is only to his damage. *Bramſton* Chief Juſtice: the wife only is to be indicted for the keeping of a Bawdy-houſe, and therefore ſhe only is damnified by the words, and the husband ought to joyn in the Action, but that is only for conformity, and the concluſion of the Plea is good, for the damage of the wife is the damage of the husband, and therefore *ad damnum ipſorum* good. And here it was agreed, that to ſay that a woman is a Bawd, will not bear an Action; but to ſay, ſhe keeps a Bawdy-houſe, will. *Porter*, who was for the Action cited a Caſe, which was thus. One ſaid of the wife of another, that ſhe had bewitched all his beaſts; and ſhe and her husband joyned in an Action, and upon debate it was adjudged good; and there the concluſion alſo of the plea was *ad damnum ipſorum.*

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Rickebies *Case*.

250. *Rickebie* was indicted in *Durham* for Murder, and afterwards the Indictment was removed into the Kings Bench, where he pleaded his Pardon, which Pardon had these words in it, *viz. Homicidium felloniam, felloniam interfectionem, necem, &c. seu quocunque alio modo ad mortem devenerit.* And note, there was a *Non obstante* in the Pardon of any Statute made to the contrary; and whether these words in the Pardon were sufficient to pardon Murder or not, was the Question. *Hales* for the Prisoner said, that the Pardon was sufficient to pardon Murder, and in his argument first he considered whether Murder were pardonable by the King at the Common Law or not, and he argued that it was; the King is interessed in the suit, and by the same reason he may pardon it. It is true, that it is *Malum in se*, and therefore will not admit of dispensation, nor can an appeal of Murder which is the suit of the Subject be discharged by the King, but the King may pardon Murder although he cannot dispense with it: see *Bracton lib.* 3. *cap.* 14. And the Law of the Jews differs from our Law & so the constitution of other Realms; then the question is, Whether this Prerogative of the King to pardon murder be taken away by any Statute or not; and first for the Statute of 2 E. 3. *cap.* 2. upon which all the other Statutes depend: that Statute made was only to prevent the frequencie of Pardons, but not totally to take away the Kings Prerogative, for the words of the Statute are, *That offenders were incouraged because that Charters of Pardon were so easily granted in times past*, &c. And the Statute of 13 *R.* 2. *cap.* 2. admits the Power and Prerogative of the King of pardoning Murder notwithstanding the former Statute; for that Statute prescribes the form only; and 13 *R.* 2. in the Parliament-Roll, *Number* 36. the King saith, *Saving his Prerogative.* The next thing considerable here is, admitting Murder pardonable by the King, Whether in this Pardon there be sufficient words

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to pardon murder or not, and he argued that there was; and first for the word (*felony*) and he ſaid, that by the Common Law pardon of felony is pardon of murder; the Statute of 18 E. 3. *cap.* 2. inables Juſtices of Peace to hear and determine felonies; and in 5 E. 6. *Dyer* 69. *a.* it is holden clearly that the Juſtices of Peace by virtue of that act have authority to inquire of murder, becauſe it is felony; and in *Inſtit.* 391. *a.* By the Law at this day under the word (*felony*) in Commiſſions, &c. is included Petit Treaſon, Murder, &c. Wherefore murder being felony, the pardon of felony is the pardon of murder. Further he ſaid, that the pardon of manſlaughter is a good pardon of murder; for he ſaid that murder and manſlaughter are all one in ſubſtance, and differ only in circumſtance, as the Book in *Plowd. Comment. fol.* 101. is, and if they were divers offences, then the Jury could not find a man indicted of murder guilty of manſlaughter, as it was in the Caſe before cited. The laſt words are, *& quocunque alio modo ad mortem devenerit*, which extends to all deaths whatſoever; and if it ſhould not be ſo, the Statute of 13 *R.* 2. ſhould be in vain. I agree the Books of 1 E. 3. 14. 22 *Aſſ.* 49. & 21 E. 3. 24. objected on the other ſide, that the pardon of felony doth not extend to treaſon, with which the *Inſtitutes* 391 agrees, they make not againſt me; ſee the Statute of 25 E. 3. *cap.* 2. and the Books of 9 E. 4. 26. by *Billin.* & 8 H. 6. 20. by *Strange*, they are but bare opinions. It was objected that an Indictment at the Common Law ſhall not extend to murder unleſs the word (*Murdravit*) be in the Indictment: I anſwer, that a pardon of felony may pardon robbery, and yet here ought to be alſo *Robberia* in the Indictment. A pardon need not nor can follow the form of Indictments, the offence apparent, it ſufficeth. Further, he argued that the King might diſpenſe with the Statute of 2 E. 3. & 13 *R.* 2. by a *Non obſtante*. It was objected, that the Kings grant with a *Non obſtante* the Statute of 13 *R.* 2. *cap.* 5. of the Admiralty is not good, and that ſo of a pardon of murder with a *Non obſtante*: to that he anſwered, and took this difference, Where the ſubject hath an immediate intereſt in an Act of Parliament, there

there the King cannot diſpenſe with it, and ſuch is the caſe of the Admiralty; but where the King is intruſted with the managing of it, and the ſubject only by way of conſequence, there he may: ſee 2 *R.* 3. 12. & 2 *H* 7. 6. It was objected, that the King cannot diſpenſe with the inquiry of the Court upon the Statute of 13 *R.* 2. *cap.* 1. To that he anſwered, that the inquiry is the Kings ſuit, and therefore he may diſpenſe with it: See 5 *E.* 3. 29. It was objected further, that the Pardon ſaith, *Unde indictatus eſt.* To that he anſwered, That if it be left out it is good without it, for the ſame is only for information; See 36 *H.* 6. 25. And the words of pardon are uſual to ſay, *Unde indictatus vel non indictatus, utlegat' vel non utlegat'*. and that would avoid all Pardons before if it ſhould be ſuffered, and for theſe cauſes he concluded and prayed that the Pardon might be allowed. *Shaftoe* of *Grays-Inn* at another day argued for the King, that the pardon was inſufficient, and firſt he ſaid, That the words of the pardon were not ſufficient to pardon murder. For the words *Homicidium* and *Felonicam interfectionem* are indifferent words, and therefore ſhall not be taken in a ſtrict and ſtrained ſenſe. It is true, that killing is the *Genus*, but there are ſeveral Species of it and ſeveral offences. Now for the word (*Felony*) I conceive that the pardon of Felony will not pardon murder, *vide* 33 *H.* 8. 50. *fol.* 4. *Dyer.* But yet I conceive that felony in the general ſenſe will extend to murder, but not in a Pardon, for there ought to be preciſe and expreſs words, and ſo are the Books of 8 *H.* 6. 20. by *Strange*, and 22 *H.* 7. *Keilway* 31 *b.* expreſs in the point, *Hill.* 2. *Jac. Inſtitut.* 391. *a.* and *Stamford* Pleas of the Crown, 114. *a.* If a man be indicted for an offence done upon the Sea, it is not ſufficient for the Indictment to ſay *Felonicè*, but it ought alſo to ſay *Pyraticè*. And pardon of all felonies is not a Pardon of all Pyracie; by the ſame reaſon, here pardon of Felony is no pardon of Murder. For the laſt words, *Quocunque alio modo ad mortem pervenerit*, theſe words do not pardon Murder, becauſe they are too general, *vide*

8 *H.*

8 H. 4. 2. c. 29 All. Pl. 24. And clearly if there were but the general words they would not pardon Murder. It was objected that these words are as much as if murder had been expressed in the pardon. To that he answered, that the Statute of 13 R. 2. *cap.* 1. saith that the offence it self ought to be expressed, and doth not say by words equipollent; and the Title of the Statute is, that the offence committed ought to be specified. In all Pardons the King ought to be truly informed of the form, as also of the Indictment and proceeding upon it: See 6 *Rep. fol.* 13. and here is no recital in the Pardon, 9 E. 4. 28. 8 H. 4. 2. Pardon of Attainder doth not pardon the felony, and pardon of the felony doth not pardon the Attainder. I agree that the King may pardon his suit, but the same ought to be by apt words. The words of *Licet indictatus*, or *non indictatus*, will not help it, it goeth to the proceedings only, and not to the matter. Besides, the Law presumes that the Patent or Pardon is at the suggestion of the party; and therefore if the King be not rightly informed of his Grant, he is deceived, and the Grant void; and perhaps if the King had been informed that the fact done was murder, he would not have pardoned it; and the words *Ex certa scientia* shall not make the Grant good, where the King is deceived by false suggestion of the party: See *Altonwoods* Case, 1 *Rep.* 46. *a.* & 52. *b.* 9 E. 4. 26. *b.* is an authority in the point: by *Billing* Charter of Pardon ought to make express mention of murder, or otherwise it will not pardon it; and 22 H. 7. 9 1. *b. Keilway*, Pardon of all felonies will not pardon murder, *Br. Charter de pardon* 10. there ought to be express words of murder in the pardon: See the *Old Entries*, 455. 2 *Ri.* 7. 6. by *Ratcliffe* objected, that the King may pardon murder with a *Non obstante*, that I agree, but it ought to be by express words: See *Stamford* Pleas of the Crown, *fol.* 103, 104. and 19. *a.* Where it is said, that a pardon of all felonies doth not extend to murder. Besides, I conceive that a *Non obstante* cannot dispense with the Statute of 13 R. 2. I agree that where there is a

penalty

penalty only given by the Statute, there the King may diſpence with it. I agree the Book of 2 *H.* 7. 6. there it was a penalty only. I agree alſo that the King may diſpenſe with the Statute of *Quia emptores terrarum*, as the Book is, *N. B.* 3. 211. *f.* But when a Statute is abſolute and not *Sub modo*, there he cannot diſpenſe with it: See 18 *Eliz. Dyer* 352. and 8 *Rep.* 29. *Princes* Caſe, *Inſtitut.* 120. *a.* and *Hobarts Rep.* 103. The King with a *Non obſtante* cannot diſpenſe with the Statute of Simony, becauſe it is a poſitive Law and not *Sub modo*, and this Statute of 13 *R.* 2. is for the common good. It was objected that the King may pardon murder by the Common Law, and that the Statute of 13 *R.* 2. takes away the inquiry only; further, it was objected, that the Statute of 2 E. 3. did allow that the King might pardon murder, but not ſo eaſily; and the Statute of 13 *R.* 2. is ſaving our Regality, by which was concluded that his Prerogative is ſaved. *Bracton fol.* 133. *a.* ſaith, that the Kings pardoning of murder was *contra juſtitiam*, and *Regiſter fol.* 300. *Se defendendo*, and *per infortunium* only are pardonable; and that well expounds the Statute of 2 E. 3. *cap.* 2. which enacts that Charters of Pardon ſhall be only granted where the King may do it by his Oath; that is to ſay, where a man kills another *Se defendendo*, or *per infortunium*. And for the ſaving of the Regality, which is in the Statute of 13 *R.* 2. to that I ſay, that the Judges ought to judge according to the body of the Act, and that is expreſs that the King cannot pardon murder. 5 *E.* 3. 29. and *Kelway* 134. there it is diſputed, but yet it came not to our Caſe for that is only of a pardon of the Kings ſuit: and for theſe reaſons he prayed that the pardon might not be allowed. *Keeling* for the King, that the pardon is not ſufficient to pardon murder: The Kings pardons ought to be taken ſtrictly, and ſo is the 5 *Rep.* The Queſtion here is not, whether the general words ſhall extend to murder; but whether it ought to be preciſely expreſſed in the Pardon or not, and he held that it ought; and he held that the King cannot diſpenſe with the Statute of 13 *R.* 2. by a *Non obſtante* the Books of 2 *R.* 3. & 2 *H.* 7. 6. & 11.

Rep. 88. That the King may diſpenſe with a Penal Law he agreed, but he ſaid that this Act of 13 *R.* 2. binds the King in point of Juſtice, and therefore the King cannot diſpenſe with it; and *Inſtitutes* 234. the King by a *Non obſtante* cannot diſpenſe with the buying and ſelling of Offices contrary to the Statute, becauſe it toucheth and concerneth Juſtice. Wherefore he prayed that the Pardon might not be allowed.

FINIS.